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Veiled Muslim Women and Driver's License Photos: A Constitutional Analysis

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VEILED MUSLIM WOMEN AND DRIVER'S LICENSE PHOTOS: A CONSTITUTIONAL ANALYSIS

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INTRODUCTION

On June 4, 2004, the Florida ACLU filed an appeal in the case of *Freeman v. State* that remains pending almost one year later.[1] The ACLU was appealing the June 6, 2003 decision of a Florida state intermediary level court upholding the Florida Department of Highway Safety and Motor Vehicles' (DHSMV) revocation of a Muslim woman's driver's license on account of the woman's refusal to take a photograph for her license without her veil, or "niqab."[2] The Muslim woman, Sultaana Lakiana Myke Freeman, believes from her study of the Quran and the Sunnah that legislation from Allah mandates that she, as a Muslim woman, veil

[*] Brooklyn Law School Class of 2005; B.A., Boston University, 2002. I would like to thank my editor Doug Brooks and the entire *Journal of Law and Policy* Executive Board, especially Skye Phillips and Cory Shindel for their patience and for all of the time and effort they poured into assisting me with my note. I would like to thank my father, Steve Oren, for teaching me not to accept the conclusions of others, but rather, to think for myself. I would also like to thank my mother, Roz Oren, for teaching me to respect those whose beliefs differ from my own.

[1] Telephone Interview with ACLU of Florida (April 18, 2005); Brief for Appellant at 44, Freeman v. State, No. 2002-CA-2828, 2003 WL 21338619 (Fla. Cir. Ct. June 6, 2003), *available at* http://www.aclufl.org/pdfs/Legal%20PDfs/Freeman%20appeal%20brief.pdf.

[2] Freeman v. State, No. 2002-CA-2828, 2003 WL 21338619 (Fla. Cir. Ct. June 6, 2003). The case was decided by the Florida Circuit Court, Ninth Judicial Circuit. *Id.* at *1. The plaintiff referred to her veil, which covers her entire face with the exception of her eyes, as a niqab. *Id.*

her face as part of her religious obligation to dress modestly.[3]

Ms. Freeman challenged the Florida statute that requires a full-face photograph for driver's licenses[4] on the grounds that it violated Florida's Religious Freedom Restoration Act of 1998[5] (FRFRA) and Florida's state constitution.[6] The FRFRA prohibits the State from substantially burdening an individual's exercise of religion absent a compelling state interest and proof by the State that the law that burdens the individual's religious freedom is the least restrictive means of achieving the state's interest.[7] The free exercise of religion is similarly protected under Article I, Section 3 of the Florida Constitution, which grants the right to religious freedom.[8]

Notably, Freeman did not challenge the State's driver's license photo requirement on federal constitutional free exercise grounds because the Supreme Court has held that there is no federal remedy for individuals who claim only that their religious practices are interfered with by a neutral law of general applicability.[9] The Supreme Court has left open the possibility of a "hybrid claim," however, when a neutral law of general applicability interferes

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[3] *See Statement by Sultaana Lakiana Myke Freeman*, (May 27, 2003), *available at* http://www.aclufl.org/issues/religious_liberty/freemanpersonal_statement.cfm (last visited Apr. 5, 2005).

[4] FLA. STAT. ANN § 322.142(1) (West 2004). The Florida statute describing the requirements for driver's licenses uses the term "fullface photograph." *Id.* § 322.142(1). For the sake of consistency, this note will use the term "full-face photograph" to describe the driver's license photographs required by the Florida law. In *Freeman*, there was an initial argument about whether a veiled Muslim woman fulfilled the requirement of a full-face photograph because, although veiled, the woman was facing the camera when her photograph was taken. *Freeman,* 2003 WL 21338619, at *2 n.2. This note, like the Florida court, assumes that the full-face requirement dictates that a veiled Muslim woman must unveil for her driver's license picture.

[5] FLA. STAT. ANN § 761.03 (West 2004).

[6] FLA. CONST. art. I, § 3; *Freeman,* 2003 WL 21338619, at *1.

[7] FLA. STAT. ANN. § 761.03 (West 2004).

[8] FLA. CONST. art. I, § 3.

[9] Employment Div., Dep't. of Human Res. of Or. v. Smith*,* 494 U.S. 872, 890 (1990). A neutral law of general applicability is now subject only to rational basis review. *Id.*

with the free exercise of religion as well as a conjoining constitutional right.[10]

This note examines whether laws that require veiled Muslim women to unveil for their driver's license photographs violate these women's Fourth Amendment right to protection against unreasonable searches in addition to their right to free exercise of religion and, therefore, give rise to a "hybrid" claim with an available federal remedy.[11] Part I of this note summarizes the *Freeman* case. Part II describes the present status of free exercise jurisprudence, including hybrid claims.[12] Part III.A discusses the components of a Fourth Amendment claim and analyzes how a hybrid claim might be asserted.[13] Part III.B applies the hybrid

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[10] *Id.* at 881. "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech." *Id.*

[11] *Id*. (noting that "hybrid" claims are the lone claims available to challenge a neutral law of general applicability under the Free Exercise Clause of the First Amendment).

[12] This note does not address the question of whether driving is a privilege or a right because the court in *Freeman* treated driving as a right, despite the fact that the language of the driver's license statute in question referred to driving as a privilege. Freeman v. State, No. 2002-CA-2828, 2003 WL 21338619, at *6 (Fla. Cir. Ct. June 6, 2003). The Florida court stated:

> Although the Florida statutes use the term "driving privileges" this does not mean that driving is a "privilege" rather than a "right." The Court recognizes that in *Sherbert v. Verner*, the U.S. Supreme Court stated that the distinction between privilege and right is not meaningful when the benefit in question, i.e., being able to drive a car and thereby conduct normal life activities, is the same. So even if driving is a "privilege," the government may not deny Plaintiff that benefit without showing that there is a compelling state interest that overrides her right to free exercise of religion.

Id. (citations omitted). For a discussion of the Supreme Court's "unconstitutional conditions" doctrine, see Jason Mazzone, *The Waiver Paradox,* 97 NW. U. L. REV. 801 (2003).

[13] Although Freeman's claim was not successful, had Freeman's attorneys attempted to make a federal hybrid claim, this claim might not have even made it to trial had the state made a motion under FED. R. CIV. P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief could be granted. If

claim analysis to a case such as that of Freeman by weighing a veiled Muslim woman's right to Fourth Amendment protection and free exercise of religion against the State's interest in the full-face driver's license photo requirement. This note concludes that a Muslim woman who wishes to be photographed for her driver's license may assert a hybrid claim, however, given the fact that there has yet to be a successful hybrid claim, it is doubtful that her claim would be successful.

I. *FREEMAN V. STATE*

In *Freeman v. State,* the Florida Circuit Court of the Ninth Judicial District decided the case of Ms. Freeman, whose previously-issued driver's license was revoked after she refused to take a new picture for her driver's license without her full-face veil.[14] The Florida court evaluated the *Freeman* case under both the Florida Constitution,[15] which grants the right to religious freedom, and the FRFRA,[16] which prohibits the State from

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the court had decided in a pre-trial motion that Freeman did not have a valid hybrid claim, her case would not have been heard. Therefore, Freeman's lawyers were better off challenging the law under Florida's RFRA, which provides an available remedy. Indeed, only twelve states have legislation that protects the free exercise of religion. *See infra* note 98. In states without free exercise legislation, a plaintiff would have little to lose by asserting a hybrid claim (except of course the money spent on attorney's fees).

[14] *Freeman,* 2003 WL 21338619.

[15] FLA. CONST. art. I, § 3 (West 2004). "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof . . . ." *Id.*

[16] FLA. STAT. ANN. § 761.03 (West 2004). In relevant part, the statute reads:

> (1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:
>
> (a) Is in furtherance of compelling governmental interest; and
>
> (b) Is the least restrictive means of furthering that compelling governmental interest.

substantially burdening the free exercise of religion unless the State can prove both a compelling state interest and that the law is the least restrictive means of achieving the State's goal.[17] The *Freeman* court held that Freeman's right to free exercise of religion was not substantially burdened, but nevertheless analyzed the State's compelling interest in the driver's license statute, holding that strict scrutiny review was required because Freeman alleged an infringement upon her fundamental constitutional right to free exercise of religion.[18]

A. Freeman's Case

On February 21, 2001, the State of Florida issued Sultaana Lakiana Myke Freeman a driver's license that contained a picture of her wearing a full-face veil, or niqab, so that only her eyes were visible.[19] Freeman's face was similarly covered in the photograph on her driver's license from Illinois, where she lived prior to her move to Florida.[20] On November 28, 2001 and December 18, 2001, Freeman received letters from the State of Florida informing her that her license would be revoked if she did not report to the DHSMV to be photographed without her veil for her driver's license.[21] For religious reasons, Freeman refused to comply, and her license was revoked.[22] Freeman then brought an action challenging Florida's revocation of her driver's license under the FRFRA and the Florida Constitution.[23]

The court found that the driver's license requirement did not substantially burden Freeman because the DHSMV had a practice

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> (2) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

Id.

[17] *Id.*

[18] *Freeman,* 2003 WL 21338619 at *1.

[19] *Id.* at *4.

[20] *Id.* at *1.

[21] *Id.*

[22] *Id.*

[23] *Id*.

of accommodating women who veil by having a female employee photograph them in a private room so that the women's face and hair would only be exposed to a female employee and, in certain situations (for example, when women were pulled over) to law enforcement officers.[24] Because the court found no substantial burden, it held that the statute did not violate the FRFRA, given that the Act only precludes the State from *substantially* burdening an individual's free exercise of religion and does not prohibit the State from enacting a statute that places a lesser burden on an individual's free exercise of religion.[25]

The court also addressed Freeman's constitutional claim.[26] Article I, Section 3 of Florida's constitution provides: "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace, or safety . . . ."[27]

The Florida court held that it was required to apply the strict scrutiny standard of review to Freeman's constitutional claim to determine whether the State had a compelling interest to justify its restriction of a religious practice.[28] The court thus analyzed whether the State had a compelling interest in the statute requiring full-face driver's license photographs.[29]

B. The Freeman *Court's Compelling Interest Analysis*

Freeman argued that the State did not have a compelling interest in restricting her right to have a driver's license without a full-face photograph because a driver's license is not a state identification card, but rather, is "merely certification of competence to drive."[30] Freeman relied on three cases upholding the right of religious Christians to receive driver's licenses without

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[24] *Freeman*, 2003 WL 21338619, at *3.

[25] *Id.* at *4.

[26] *Id.* at *1.

[27] FLA. CONST. art. I, § 3.

[28] *Freeman,* 2003 WL 21338619, at *1.

[29] *Id.*

[30] *Id.* at *5.

photographs because of their religious beliefs that photographs constitute graven images.[31] Specifically, Freeman cited *Quaring v. Peterson*, in which the Eighth Circuit held that there was no compelling state interest in the photograph requirement because individuals who possessed out-of-state licenses that did not contain photographs were permitted to drive in the state.[32] Further, Freeman cited *Bureau of Motor Vehicles v. Pentecostal House of Prayer*[33] and *Dennis v. Charnes*, which held that allowing an exception for individuals whose religions proscribe the taking of photographs would not lead to widespread abuse.[34]

In addition to arguing that her claims should be considered under the same reasoning as the graven images cases, Freeman also challenged the utility and accuracy of driver's license photographs.[35] Specifically, Freeman contended that photographs are "largely flawed" and can be "easily thwarted" by those who "change their hair, cover their foreheads and ears, wear large glasses, shave their heads, grow their beards, or alter their appearance by other means, including contact lenses and plastic surgery."[36]

Freeman further argued that there are more than 4,000 people to whom the State of Florida issued photo-less driver's licenses and tens of thousands of people from other states with photo-less driver's licenses driving in the State of Florida.[37] Thus, she argued, Florida lacked a compelling interest in refusing to grant religious exceptions to its driver's license photograph requirement.[38]

In holding for the State, the Florida court adopted the State's arguments as its own analysis.[39] The State argued that it had a

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[31] *Id.*

[32] *Id.* (citing Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984)).

[33] *Freeman,* 2003 WL 21338619, at *5 (citing Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., 380 N.E.2d 1225 (Ind. 1978)).

[34] *Freeman,* 2003 WL 21338619, at *5 (citing Dennis v. Charnes, 805 F.2d 339 (10th Cir. 1984)).

[35] *Freeman,* 2003 WL 21338619, at *5.

[36] *Id.*

[37] *Id.* at *6.

[38] *Id.*

[39] *Id.* at *3-7.

compelling interest in the full-face photograph requirement because the requirement promotes safety and security, combats crime, and protects interstate commerce.[40] In response to Freeman's argument that photographs are not effective, the State presented a witness who testified that photographs of faces that have changed are still more effective than veiled photographs because some facial features do not change.[41] Furthermore, the State contended that, without a full-face photograph, law enforcement officers would be at a greater risk when they stopped individuals, given the extra time necessary to verify the driver's identity.[42] The State also asserted that, despite the fact that such intent does not appear in the driver's license statute, driver's licenses are intended for use as identity documents by people in "society at large to cash checks, rent cars and clear airport security."[43] Moreover, the State distinguished Freeman's case from earlier cases permitting exceptions to the driver's license photograph requirements.[44] In adopting the State's analysis, the court noted that the world is different than it was twenty to twenty-five years ago and that since 1978, when the first of the three cases cited by Freeman was decided, the increased degree of domestic terror has amplified the potential for widespread abuse.[45]

Next, the court rejected the argument that Freeman should be granted an exception based on the fact that others, including out-of-state drivers and those with temporary licenses, are legally allowed to drive in Florida without a full-face photograph on their

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[40] *Freeman,* 2003 WL 21338619, at *4.

[41] *Id.* at *5.

[42] *Id.*

[43] *Id.*

[44] *Id.* at *7.

[45] *Id.* According to the U.S. Centennial of Flight Commission, the U.S. Department of Transportation reported that there were 364 hijackings worldwide from 1968 until 1972. There were no hijackings from February 1991 until September 11, 2001. Judy Rumerman, U.S. Centennial Flight Commission; Aviation Security, *available at* http://www.centennialofflight.gov/essay/Government_Role/security/POL18.htm (last visited May 18, 2005). There have been no hijackings since September 11, 2001. Eli Lehrer, *The Homeland Security Bureaucracy,* PUBLIC INTEREST, June 22, 2004, at 71.

licenses.[46] The court explained that individuals with temporary licenses that did not contain photographs had already received a permanent license, and therefore, the State possessed a full-face photograph of those individuals.[47] The court held that the State of Florida cannot control the laws of other states and must accept their citizens' driver's licenses because full faith and credit is given to the laws of other states.[48] The court held that Florida can, however, exert control over its own residents and impose regulations regarding the requirements for obtaining driver's licenses within the state.[49]

Based on its analysis of both parties' arguments, the court found that the driver's license statute promoted public safety and protected against fraud, and thus, the State had a compelling interest in the statute that outweighed the seemingly insubstantial burden the law posed to the free exercise of religion.[50] The court also explained that, given the accommodations put in place by the DHSMV, the statute was the least restrictive means of furthering the State's interest.[51] Thus, the court held that the driver's license statute did not violate Article I, Section 3 of the Florida Constitution.[52]

II. RELIGIOUS FREEDOM CLAIMS

Freeman challenged the revocation of her driver's license due to her refusal to unveil under the FRFRA and Florida's state

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[46] *Freeman,* 2003 WL 21338619, at *6.

[47] *Id.*

[48] *Id.* 28 U.S.C. § 1738 (West 2005) provides:

> [a]cts of the legislature of any state, territory or possession of the United States . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Id.

[49] *Freeman,* 2003 WL 21338619, at *6.

[50] *Id.* at *7-8.

[51] *Id*.

[52] *Id.*

constitution.[53] Freeman notably pursued these avenues of relief based on the lack of a federal remedy. A federal claim under the First Amendment's Free Exercise Clause would have been unsuccessful[54] because such a claim, which alleges only a violation of a person's freedom of religion, no longer applies to neutral laws of general applicability.[55] This section discusses Supreme Court case law regarding federal free exercise review and analyzes the remedies that remain available to individuals whose free exercise of religion is substantially burdened by neutral laws of general applicability.

A. Federal Free Exercise Clause Review

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[56] In *Sherbert v. Verner*, the Supreme Court interpreted the Free Exercise Clause to mean that "if the purpose *or effect* of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid *even though the burdens may be characterized as only indirect.*"[57] Under this interpretation of the Free Exercise Clause, the Supreme Court

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[53] *Freeman,* 2003 WL 21338619, at *1.

[54] *See* The Case of Mrs. Sultaana Freeman, *at* http://www.aclufl.org/news_events/archive/2003/freemanrelease052703.cfm. The Florida ACLU represented Freeman and discusses her case on the organization's website.

[55] Daniel A. Crane*, Beyond RFRA*: *Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 238 (1998) ("As a result [of *Flores*], the states are no longer bound by any federal standard, whether statutory or constitutional, to exempt the religiously devout from neutral laws of general applicability."). Driver's license requirements are neutral laws of general applicability because they were written with the neutral intention of regulating drivers and not to regulate religious activity, and they are generally applicable in that they apply to the entire public equally and are not applied exclusively to religious individuals. Employment Div., Dep't. of Human Res. of Or. v. Smith*,* 494 U.S. 872, 890 (1990).

[56] U.S. CONST. amend. I.

[57] Sherbert v. Verner, 374 U.S. 398, 404 (1963) (citing Braunfeld v. Brown, 366 U.S. 599, 607 (1961)) (emphasis added).

invalidated a number of neutral, generally applicable laws as they applied to the religiously observant.[58]

In *Sherbert*, the petitioner, a Seventh Day Adventist, was fired from her job because, for religious reasons, she would not work on Saturdays.[59] While the petitioner sought other employment following her dismissal, she refused to accept positions that required her to work on Saturdays and could not find a job that did not require her to do so.[60] The petitioner was subsequently denied unemployment benefits under the South Carolina Unemployment Compensation Act, which provided that a person is not eligible for benefits if "he has failed without good cause . . . to accept available suitable work when offered to him by the employment office or the employer."[61] In reviewing the petitioner's claim, the *Sherbert* Court applied a balancing test, equivalent to strict scrutiny review, in which it balanced the state's compelling interest in the law against the substantial burden the law imposed on the plaintiff's religious practices.[62] The Court found that the substantial burden of the petitioner's being required to work on her Sabbath or forgo state benefits outweighed the state's interest in preventing fraudulent claims that would dilute unemployment funds and disrupt work schedules.[63]

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[58] *See* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 146 (1987) (holding that Florida's refusal to award unemployment compensation benefits to a Seventh Day Adventist who quit her job because she would not work on her Sabbath was unconstitutional under the Free Exercise Clause); Thompson v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 720 (1981) (holding that the state's termination of petitioner's unemployment on the grounds that the petitioner quit his job violated the Free Exercise Clause because his religion prohibited making armaments); Wisconsin v. Yoder, 406 U.S. 205 (1972) (excepting the Amish from a general state law requiring that children remain in school until they are sixteen years of age).

[59] *Sherbert*, 374 U.S. at 399. This balancing test is also called "strict scrutiny." *See id.* at 908-09 (Blackmun, J., dissenting) (referring to the *Sherbert* test as strict scrutiny review).

[60] *Id.* at 402 n.3.

[61] *Id.* at 400-01 (citing S.C. CODE ANN. § 68-1-404 (Law Co-op. 1962)).

[62] Employment Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 875 (1990) (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

[63] *Sherbert,* 374 U.S. at 407.

In 1990, however, the Court narrowed its definition of free exercise. In *Employment Division v. Smith*,[64] the Supreme Court rejected the application of strict scrutiny review to free exercise claims.[65] In *Smith*, the Court considered the case of two Native Americans who were dismissed from their jobs for ingesting peyote during a religious service and who were subsequently denied unemployment benefits by the State of Oregon because ingesting peyote was a criminal offense under Oregon state law.[66] The Supreme Court of Oregon applied strict scrutiny and held that, although the respondents had committed a crime by using peyote, the purpose of the unemployment law, which precluded the receipt of benefits by individuals who were dismissed from their jobs for misconduct, was not to punish individuals for crimes, but rather, to preserve the fund's integrity.[67] The court held that the burden on the respondent's religious practice outweighed the purpose of the law; therefore, the law was unconstitutional.[68]

The U.S. Supreme Court overruled the Oregon Supreme Court's decision, rejecting the application of strict scrutiny to a free exercise claim that challenged a neutral law of general applicability.[69] The Court held that the Free Exercise Clause would be violated were a law to specifically target a religious group or religious observance, for example, if a statute were to specifically prohibit "bowing down before a golden calf."[70] The Court noted, however, that the right to free exercise of religion under the First Amendment is not unlimited.[71] The Court explained that to allow individuals in all circumstances to practice their religions, even when their doing so would conflict with existing, generally applicable law, would "contradict[ ] both constitutional tradition and common sense" because individuals would be excused from following the law whenever their religions conflicted with the

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[64] *Smith,* 494 U.S. at 872.
[65] *Id.* at 884.
[66] *Id.* at 872.
[67] *Id.* at 875.
[68] *Smith,* 494 U.S. at 875.
[69] *Id.*
[70] *Id.* at 878.
[71] *Id.* at 886.

laws.[72] The Court cited a sampling of cases in which it had rejected the extension of free exercise protection to individuals when state laws interfered with the practice of religion.[73] The Court's examples included laws prohibiting polygamy and child labor, and those requiring the payment of Social Security taxes.[74] The Court noted that it had never invalidated a neutral law of general applicability when the law interfered only with a person's right to free exercise of religion.[75]

Rather than applying strict scrutiny, the Supreme Court in *Smith*[76] held that it is up to the "political process" and not the courts to protect the interests of individuals whose religious practices are interfered with by a neutral, generally applied state law.[77] Although it rejected the use of the strict scrutiny as the standard of review for free exercise claims, the *Smith* Court did not overrule *Sherbert*.[78] Instead, the Court distinguished the case before it from *Sherbert*, stating that strict scrutiny applied only to "employment compensation" cases, not criminal matters, as examined in *Smith*.[79] The Supreme Court explained that the issue

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[72] *Id.*

[73] *Id.* at 879-80 (citing Reynolds v. United States, 98 U.S. 145 (1879) (holding that a person who believed, based on his religion, that a law prohibiting bigamy should not have been enacted is not immune from prosecution for violating that law); Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that a woman who used her child to distribute literature on the street could be prosecuted for violation of child labor laws, despite the fact that the literature being distributed was religious); United States v. Lee, 455 U.S. 252 (1985) (holding that an Amish person was not exempt from paying Social Security taxes, even though his religion prohibited taking part in governmental support programs)).

[74] *Smith*, 494 U.S. at 886.

[75] *Id.* at 878-79. "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.*

[76] *Id.* at 872.

[77] *Id*. at 872, 890. The phrase "political process" describes the legislature. *Id.*

[78] *Id.* at 884 (holding that "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law").

[79] *Id.*

in *Smith* was not whether Oregon could deny the respondents benefits, but rather, whether the Oregon criminal statute, which generally prohibits the use of peyote, could be applied to individuals whose religion required its use.[80] The Court held that unemployment compensation cases belong to a separate class of cases in which exceptions for free exercise of religion are permitted because "a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment."[81] The Court further held "that where the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[82]

The Court also distinguished *Smith* from prior Supreme Court cases in which it had invalidated statutes as applied to the religiously observant, holding that the burden on the religious individuals in those cases outweighed the states' compelling interests in the challenged statutes.[83] The Court held that the cases in which it had invalidated laws on free exercise grounds involved both a right to free exercise *and* a conjoining additional constitutional claim, and that strict scrutiny is only available in such "hybrid" cases.[84] As a result of *Smith*, under existing federal law, a court may still apply strict scrutiny in free exercise cases involving 1) laws that are not neutral and generally applicable 2) unemployment compensation, or 3) a free exercise claim that is

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[80] *Id.* at 876.

[81] *Smith*, 494 U.S. at 884.

[82] *Id.* (citing Bowen v. Roy, 476 U.S. 693 (1986)).

[83] *Id.* at 881-82.

[84] *Id.* (citing Catwell v. Connecticut, 310 U.S. 296 (1940)) (containing conjoining free speech and free press claims); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (containing a conjoining free speech claim); Follet v. McCormick, 321 U.S. 573 (1944) (same); Pierce v. Society Sisters, 268 U.S. 510 (1925) (containing conjoining claim of parents' right to direct the education of their children); Wisconsin v. Yoder, 406 U.S. 205 (1972) (same); Wooley v. Maynard, 430 U.S. 705 (1977) (decided on free speech grounds, but containing a conjoining free exercise claim); West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943) (same).

conjoined with another constitutional claim.[85] However, when a neutral law of general applicability violates only the right to free exercise of religion, the state must survive only rational basis review, the lowest form of scrutiny. To prevail under rational basis review, the state need only prove that its law is rationally related to a legitimate state interest.[86]

B. The Federal and State Legislative Response to the Smith *Decision*

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).[87] The Senate Report that accompanied the Act criticized the *Smith* decision and explained that "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution."[88] The report also stated that "laws 'neutral' towards religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[89] The

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[85] *Smith,* 494 U.S. at 884-85 (holding the *Sherbert* test inapplicable to challenges against generally applicable laws on free exercise grounds, but excepting employment cases from those to which the *Sherbert* test applies). *See also* Swanson v. Guthrie Independent School District, 135 F.3d 694, 700 n.5 (10th Cir. 1998) ("The *Smith* opinion does not make it clear whether it is constitutionally sufficient for a law or policy to be neutral and of general applicability, or whether the policy or law will still have to satisfy some lesser standard than the compelling interest test.").

[86] S. REP. NO. 103-111, at 7-8 (1993) (stating that the review remaining after *Smith* when a neutral law of general applicability interferes with a person's religious observance is rational basis review).

[87] 42 U.S.C.A. § 2000bb (1993). The statute lists as its purpose:

> (1) to restore the compelling state interest test as set forth in Sherbert v. Verner, 373 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by the government.

Id. § 2000bb(b) (1993).

[88] S. REP. NO. 103-111, at 2-3 (1993).

[89] *Id.*

report further criticized the *Smith* decision, stating that "[b]y lowering the level of constitutional protection for religious practices, the decision has created a climate in which the free exercise of religion is jeopardized."[90]

In recognition of these concerns, the RFRA reinstated strict scrutiny as the test for determining whether a federal or state law violates the Free Exercise Clause of the U.S. Constitution.[91] In relevant part, the RFRA provided that the "[g]overnment shall not substantially burden a person's free exercise of religion . . . [unless] it is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling interest."[92]

In 1997, the Supreme Court, in *City of Boerne v. Flores*, struck down the Religious Freedom Restoration Act of 1993 as it applied to the states, holding that Congress had exceeded its power under the Enforcement Clause of the Fourteenth Amendment.[93] *City of Boerne* involved an RFRA challenge to city zoning ordinances by a Catholic archbishop who was denied a permit to enlarge his church.[94] The Court held that, under the Enforcement Clause, Congress has the power to make laws that protect people from state infringement upon their constitutional rights.[95] However,

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[90] *Id.*

[91] *Id. See also* City of Boerne v. Flores, 521 U.S. 507, 516-17 (1997).

[92] 42 U.S.C.A. § 2000 (West Supp. 2004). The RFRA defined "government" as "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States or a covered entity." The RFRA defined "covered entity" as "the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States." *Id.*

[93] *Flores*, 521 U.S. at 536. The Court held:

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued . . . in later cases the Court will treat its precedent with the respect due them under settled principals . . . as the provisions of the federal statute here invoked are beyond congressional authority, it is the Court's precedent, not the RFRA, which must control.

Id.

[94] *Id.*

[95] *Id.* at 517.

because the Supreme Court held in *Smith* that strict scrutiny is not available when a general law of neutral applicability interferes with one's exercise of religion, Congress cannot be said to be enforcing the constitutional right of free exercise of religion through the RFRA because the rights that the RFRA grants are not provided for by the Free Exercise Clause.[96] In other words, the Court determined that the RFRA was unconstitutional because the Act provided for rights not granted in the Constitution.[97]

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[96] *Id.* In response to the Supreme Court's striking down the RFRA, Congress has passed the Protection of Religious Exercise in Land Use and by Institutionalized Persons Act (RRLUIPA) which reinstated strict scrutiny as the test for more narrow instances of government interference with individuals' free exercise of religion including land use and zoning regulations and over people residing in or confined to government institutions. 42 U.S.C. § 2000cc (West 2005). In *Elsinore Christian Center v. City Lake of Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. 2003), the district court for the central district of California found RLUIPA unconstitutional, holding it exceeds Congress's enforcement power. *But see* U.S. v. Maui County, 298 F. Supp. 2d 1010 (D. Haw. 2003) (rejecting challenge to RLUIPA on the grounds that RLUIPA violates the Establishment Clause). *See also* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 86 P.3d 1140 (Or. Ct. App. 2004) (finding no substantial burden to Plaintiffs under RLUIPA). For a discussion of the constitutionality of RLUIPA in comparison to the RFRA, see Michael Paisner, *Boerne Supremacy: Congressional Responses to* City of Boerne v. Flores *and the Scope of Congress's Article I Power,* 105 COLUM. L. REV. 537 (2005).

[97] *Id*. Congress's enforcement power under the Fourteenth Amendment extends only to enforcing the provisions of the Fourteenth Amendment. In this case, the petitioner asserted that Congress was enforcing the Privileges and Immunities Clause of the Fourteenth Amendment, which, in pertinent part, reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process under the law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. However, the Supreme Court held in *Smith* that the right to free exercise of religion does not require strict scrutiny when neutral laws of general applicability interfere only with an individual's practice of religion. Therefore, strict scrutiny is not one of the privileges of citizens of the United States and Congress has no right to direct the state legislation in this

In response to the Supreme Court's rejection of both the *Sherbert* test and the RFRA, a number of states enacted legislation requiring a balancing test similar to *Sherbert* for neutral, generally applicable laws that impede freedom of religion.[98] Florida is among the states that have enacted Religious Freedom Restoration Acts in the wake of the Supreme Court's decisions in *Smith* and *City of Boerne*.[99] Florida's RFRA provides for strict scrutiny review like *Sherbert* and the federal RFRA.[100]

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manner. *Flores,* 521 U.S. at 536 ("RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control."). Although the Supreme Court has not ruled on whether the RFRA is constitutional as applied to the federal government, many circuit courts have held that this is so. *See* Anne Y. Chiu, *When Prisoners Are Weary and Their Religious Exercise Burdened, RLUIPA Provides Some Rest for Their Souls,* 79 WASH. L. REV. 999, 1004 n. 49 (stating that the RFRA seems to remain valid as applied to the federal government) (citing O'Bryan v. Bureau of Prisons, 349 F.3d 399, 400-01 (7th Cir. 2003)); Guam v. Guerrero, 290 F.3d 1210, 1221 (9th Cir. 2002); Henderson v. Kennedy, 265 F.3d 1072, 1073 (D.C. Cir. 2001); Kikumura v. Hurley, 242 F.3d 950, 958 (10th Cir. 2001); Christians v. Crystal Evangelical Free Church (In re Young), 141 F.3d 854, 856 (8th Cir. 1998)).

[98] According to RJ&L Religious Liberty Archive, a religious liberty watchdog organization, twelve states have enacted their own statutes protecting the free exercise of religion. *See* http://www.churchstatelaw.com/statestatutes/index.asp (last visited Feb. 10, 2005). These states include Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Ohio, Rhode Island, South Carolina and Texas. *See* ALA. CONST. amend. NO. 622 (1999); ARIZ. REV. STAT. § 41-1493(1999); CONN. GEN. STAT. § 52-571b (1993); FLA. STAT. ANN. §§ 761.01-761.05 (1998); IDAHO CODE § 73-401-404 (2000); 775 ILL. COMP. STAT. ANN. 35/15 (West 2004); MO. REV. STAT. §1.302 (2003); N.M. STAT. ANN. § 28-22-1(1978); OKLA. STAT. 51 §§ 251-58 (2000); R.I. GEN. LAW § 42-80-1 (1956); S.C. CODE ANN. § 1-32-10-60 (1999); TEX. CIV. PRAC. & REM. CODE ANN. tit. 5, § 110 (1999).

[99] FLA. STAT. ANN. §§ 761.01-761.05 (1998).

[100] Florida's RFRA provides:

> The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (b) is the least restrictive means of furthering that compelling governmental interest.

C. Hybrid Claims

Although no federal legal remedy lies when a neutral law of general applicability interferes with the right to free exercise of religion standing alone, the U.S. Supreme Court has acknowledged that a petitioner may challenge a law on Free Exercise Clause grounds if the petitioner's free exercise claim is joined with a claim based on the violation of another constitutional freedom, such as freedom of speech.[101] In such "hybrid" cases, in which a generally applicable law is challenged on the basis of the Free Exercise Clause *and* another constitutional freedom, strict scrutiny appears to remain available.[102]

To date, no circuit court has actually applied strict scrutiny to a hybrid claim.[103] However, of the circuits that have decided cases in which hybrid claims were asserted,[104] with the exception of the Second and Sixth Circuits, all have recognized the existence of

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Id. § 761.03(1)(b).

[101] Employment Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 881 (1990).

[102] *See* Crane, *supra* note 55, at 236 ("The strict scrutiny test of earlier cases would now be reserved for "hybrid" cases—those involving a combination of free exercise rights and constitutional rights.").

[103] Leebaert v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003). Hybrid claims were basically irrelevant from 1993 to 1997 because, during that time, plaintiffs asserting free exercise claims could do so under the federal RFRA. *See infra* Part I.A.

[104] The First, Second, Third, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits have decided cases in which hybrid claims were asserted. *See* Leebaert v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003); Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002); Prater v. City of Burnside, Kentucky 289 F.3d 417, 430 (6th Cir. 2002); American Family Assoc., Inc. v. City and County of San Francisco, 277 F.3d 1114 (9th Cir. 2000); Swanson v. Guthrie Independent School District, 135 F.3d 694, 700 (10th Cir. 1998); EEOC v. Catholic Charities of America, 83 F.3d 455 (D.C. Cir. 1996); Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525 (1st Cir. 1995). For further discussion of the split within in the Circuits regarding the status of hybrid claims, see Ryan M. Akers, *Begging the High Court for Clarification; Hybrid Rights Under Employment Division v. Smith*, 17 REGENT. U. L. REV. 77 (2004-2005).

such a claim.[105] The Second and Sixth Circuits have held that the Court's discussion of hybrid claims in *Smith* is not part of the Court's holding, but rather, is merely dicta; the circuits thus maintain that *Smith* overruled the *Sherbert* test for all neutral laws of general applicability, including those brought as hybrid claims.[106] The circuits that recognize hybrid claims differ in opinion with regard to whether the claim conjoined with the free exercise claim must be successful on its own or whether the claim must simply be one with "a 'fair probability' or 'likelihood' but not a certitude of success on the merits."[107]

In *Swanson v. Guthrie Independent School District*, for

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[105] *See* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003) (recognizing a hybrid claim, but holding that a plaintiff fails to assert a valid hybrid claim by conjoining a free exercise claim with a meritless claim). *See also* Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 165 n.26 (3d Cir. 2002) (recognizing hybrid claims, but noting that the plaintiffs did not assert such a hybrid rights claim); American Family Assoc., Inc. v. City & County of San Francisco, 277 F.3d 1114 (9th Cir. 2000) (recognizing hybrid claims, but holding that the conjoined claim must be colorable, which the plaintiff's free speech claim was not); Swanson v. Guthrie Independent School District, 135 F.3d 694, 700 (10th Cir. 1998) (recognizing hybrid claims, but holding that in order to succeed on such a claim, a plaintiff must be able to succeed independently on the claim conjoined with the free exercise claim); EEOC v. Catholic Charities of America, 83 F.3d 455, 467 (D.C. Cir. 1996) (recognizing the possibility that the respondents had a valid hybrid claim, but denying petitioner's claim on other grounds); Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525 (1st Cir. 1995) (recognizing the existence of hybrid claims, but denying petitioner's claim because there was no violation of a privacy right).

[106] Leebaert v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003); Prater v. City of Burnside, Kentucky 289 F.3d 417, 430 (6th Cir. 2002) (holding that *Smith* overruled the compelling state interest/least restrictive means test for a neutral law of general applicability, including those cases in which hybrid claims were asserted).

[107] Swanson v. Guthrie Independent School District, 135 F.3d 694, 700 (10th Cir. 1998) (recognizing the availability of a hybrid claim, but holding that in order to succeed on such a claim, a plaintiff must be able to succeed independently on the conjoined constitutional claim). *See also* Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) (citing Thompson v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 703, 707 (9th Cir. 1999)) (holding that a conjoined claim does not require a certitude of success).

example, the Tenth Circuit rejected a hybrid claim brought by Christian parents who desired that their home-schooled daughter take classes at a local public school.[108] The parents challenged the local school board's decision requiring that students be enrolled either full-time or not at all, and alleged a violation of the Free Exercise Clause as well as the constitutional right of parents to direct their children's education.[109] The Tenth Circuit held that, although "parents have a constitutional right to direct [their child's] education, up to a point . . . parents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject."[110] Based on this rationale, the *Swanson* court found that the petitioners did not have a valid claim based on their constitutional right to direct their child's education.[111] The court held that "it is not sufficient simply to invoke the Free Exercise Clause as well as another general constitutional claim to trigger the compelling-interest/narrowly-tailored-rule analysis," but rather, there must be a "colorable showing of infringement of recognized and specific constitutional rights."[112] The Tenth Circuit, in essence, required that the claim conjoined with the free exercise claim be one that would succeed independently.[113]

Conversely, in *Miller v. Reed*, the Ninth Circuit specifically held that its test was less stringent than that of other circuits, given that it did not require a "certitude" that the conjoined claim would succeed on the merits, but only a "fair probability" or "likelihood" that such a claim would succeed.[114] In *Miller*, a religious individual

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[108] *Swanson,* 135 F.3d at 696-97.

[109] *Id.* at 697, 699.

[110] *Id.* at 699.

[111] *Id.* at 700 (citing a host of cases in which courts rejected the claims of parents asserting a constitutional right to direct their child's education).

[112] *Id.*

[113] *Id.*

[114] Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) ("We recently held, to assert a hybrid-rights claim, 'a free exercise plaintiff must make out a 'colorable claim' that a companion right has been violated-that is, a 'fair probability' or a 'likelihood,' but not a certitude, of success on the merits.") (quoting Thompson v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 703,

who was not a member of an organized religion challenged the state's requirement that he submit his social security number in order to renew his driver's license.[115] The plaintiff claimed that this requirement interfered with his religious belief because being identified by a number diminished his identity as an individual and also that the restriction violated his fundamental right to interstate travel.[116] The Ninth Circuit held that the plaintiff did not articulate a valid hybrid claim because the conjoining constitutional claim was "utterly meritless," given that denying the plaintiff a driver's license would not prevent his interstate travel in the same way that gasoline taxes and toll roads do not violate the right to interstate travel.[117] Although the *Miller* court distinguished its analysis from that of more stringent circuits, the court utilized virtually the same analysis as the *Swanson* court; it evaluated the conjoining claim independently and then specifically denied the hybrid claim based on the weakness of the conjoining claim.[118]

Both the Ninth and Tenth Circuits' holdings indicate that, regardless of whether a *probability* or a *certainty* of success is required, the analysis of a hybrid claim centers on whether the conjoining claim can survive on its own.[119] Requiring a strong or "colorable" conjoining claim, however, diminishes the utility of a hybrid claim, as plaintiffs may sue on the conjoining claim alone.[120] As Justice Souter noted in his concurring opinion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, "if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under

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707 (9th Cir. 1999), *rev'd on other grounds by* 220 F.3d 1134 (9th Cir. 2000)).

[115] *Miller,* 176 F.3d at 1204.

[116] *Id.* at 1204-05 (holding that because the petitioner could still travel interstate as a passenger that the examined law did not affect the petitioner's right to travel, but rather, his operation of a motor vehicle).

[117] *Id.* at 1205-06. The court noted, "Other circuits have adopted similar or more stringent predicates for a hybrid rights claim." *Id.*

[118] *Id.*

[119] *Swanson*, 135 F.3d at 699.

[120] Church of the Lukumi Babalu Aye v. City of Hileah, 508 U.S. 520, 567 (1993) (Souter J., concurring) (noting that requiring the conjoining claim of a hybrid claim to be strong on its own alleviates the need for a hybrid claim).

another constitutional provision, then there would have been no reason in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all."[121]

The U.S. Supreme Court has yet to decide a hybrid claim. The Court referenced hybrid claims most recently in 2002, in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*.[122] In *Watchtower*, a group of Jehovah's Witnesses challenged on both free exercise and free speech grounds a village ordinance requiring that door-to-door canvassers or solicitors obtain a permit.[123] The Court held that it was "unnecessary to [determine the standard of review] because the breadth of speech affected by the ordinance and the nature of the regulation make it clear that the Court of Appeals erred in upholding it."[124] The question of how strong a conjoining claim must be to support a valid hybrid claim and obtain strict scrutiny review thus remains unanswered.

III. SEARCH CLAIMS UNDER THE FOURTH AMENDMENT

In addition to a free exercise claim, a veiled Muslim woman may assert that requiring her to unveil constitutes an unreasonable search under the Fourth Amendment. This section analyzes the components of a Fourth Amendment claim.

The Fourth Amendment protects people "against unreasonable

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[121] *Id. Hileah* was not a hybrid case. The petitioners challenged city ordinances banning ritual sacrifice. *Id.* The Court invalidated the ordinances, finding that *Smith* was inapplicable because the ordinances were not neutral. *Id.*

[122] Watchtower Bible and Tract Society of New York, Inc. v. Village of Straton, 536 U.S. 150 (2002).

[123] *Id.*

[124] *Id.* at 164. The Court held:

> The mere fact that the ordinance covers so much speech raises constitutional concern. It is offensive not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of every day public discourse a citizen must first inform the government of her desire to speak with her neighbors and then obtain a permit to do so.

Id. at 165-66.

searches and seizures."[125] In his concurring opinion in *United States v. Katz,* Justice Harlan set forth a two-prong test for determining whether an action constitutes a search.[126] The test requires both that the person allegedly searched have a subjective expectation of privacy in the subject of the claimed search and that society recognize the person's expectation as a reasonable one.[127] Because the Constitution protects only against *unreasonable* searches, once an action is determined to be a search, the Supreme Court must then determine whether that search was reasonable.[128] The Court has determined that individualized suspicion is required for a search to be deemed reasonable, unless authorities can establish the existence of "special needs beyond the normal need for law enforcement."[129]

A. Unveiling as a Search

The Supreme Court, in *Katz v. United States,*[130] held that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[131] However, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection."[132] The *Katz* Court held that the police's taping of the petitioner's phone calls, made within a public phone booth and taped using a device attached to the outside of the phone booth, constituted a search.[133]

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[125] U.S. CONST. amend. IV.

[126] Katz v. United States, 389 U.S. 347, 362 (1967) (Harlan J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

[127] *Id.*

[128] City of Indianapolis v. Edmond*,* 531 U.S. 32 (2000).

[129] *Edmond,* 531 U.S. at 37 (citing Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995)).

[130] Katz v. United States, 389 U.S. 347 (1967).

[131] *Id.* at 351.

[132] *Id.*

[133] *Id.* at 356-57.

Because the petitioner in *Katz* had a reasonable expectation that his conversations were private, the Court reasoned, he "may rely on the Fourth Amendment."[134]

In his concurring opinion in *Katz,* Justice Harlan articulated a two-prong test that "emerged from prior decisions" and was to be applied in cases in which a right to privacy was asserted to determine whether a search had taken place.[135] Justice Harlan's test examines 1) whether "a person exhibited an actual (subjective) expectation of privacy," and 2) whether "the expectation . . . [is] one that society is prepared to recognize as reasonable."[136] This two-prong test was subsequently adopted by the Supreme Court as the test for determining whether an individual enjoys a reasonable expectation of privacy in a given case, and therefore, receives Fourth Amendment protection.[137] Thus, under present law, in order for a veiled Muslim woman to successfully assert a right to privacy in her face, she must demonstrate not only that she has a subjective expectation of privacy in her face, but also that society is prepared to recognize that expectation as reasonable.[138]

1. The Katz *Test: Subjective Expectation of Privacy*

In explaining what is meant by something a person "seeks to preserve as private" the *Katz* Court cited with approval its earlier decision in *Rios v. United States*,[139] in which it held that the

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[134] *Id.* at 352 (holding that "[o]ne who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume the words he utters into the mouthpiece will not be broadcast to the world").

[135] *Id.* at 361 (Harlan J., concurring).

[136] *Id.* (internal quotations omitted).

[137] *See* Hudson v. Palmer, 468 U.S. 517, 525-26 (1984) (holding that the petitioner failed to satisfy the two-prong test because, although he had a reasonable expectation of privacy in his jail cell, it was not one society was prepared to accept as reasonable); *see also* Smith v. Maryland, 442 U.S. 735, 740 (1979) (holding that the petitioner did not establish either a subjective or an objective expectation of privacy in the phone numbers he dialed from his telephone).

[138] *See also Katz,* 389 U.S. at 351 (Harlan J., concurring).

[139] Rios v. United States, 364 U.S. 253 (1960).

admissibility as evidence of a package of heroin that was dropped on the floor of a taxi cab turned on whether the petitioner dropped the package before or after the police arrested him.[140] If the police arrested the petitioner without probable cause and thereafter saw the package of heroin, the search and arrest would be unlawful, and the package of heroin would be inadmissible.[141] However, if the petitioner held the package in the officers' view and the officers then arrested him based upon probable cause, that is, upon seeing the package of heroin, then evidence of the package would be admissible.[142] The *Katz* Court cited *Rios* to emphasize that when a person makes an effort to preserve something as private, as the petitioner may have done in the *Rios* case by hiding the package of heroin on the floor of the cab, that this "something" merits constitutional protection.[143]

Courts have reviewed several cases involving an individual's right to privacy in certain physical attributes.[144] Because those courts did not find a subjective expectation of privacy in the examined physical characteristics, such as one's voice, handwriting, hands, and eyes, they did not reach the question of whether society was prepared to recognize the individuals' expectations of privacy as reasonable.[145]

For example, the Sixth Circuit, in *United States v. Richardson*, analyzed the right to privacy in one's hands.[146] The *Richardson* court held that examining the petitioner's hands under an ultraviolet light before arrest and without a warrant did not

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[140] *Id.* at 261-62.

[141] *Id.*

[142] *Id.*

[143] *Katz,* 389 U.S. at 351-52 (citing Rios v. United States, 364 U.S. 253 (1960) (holding that "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected").

[144] *See* United States v. Dionosio, 410 U.S. 1 (1978) (analyzing the right to privacy in one's voice); United States v. Doe, 457 F.2d 895 (2d Cir. 1972) (analyzing the right to privacy in handwriting samples); United States v. Richardson, 388 F.2d 842 (6th Cir. 1968) (discussing the right to privacy in one's hands); State v. Shearer, 30 P.3d 995 (Idaho Ct. App. 2001) (analyzing the right to privacy in one's eyes.)

[145] *Id.*

[146] United States v. Richardson, 388 F.2d 842 (6th Cir. 1968).

constitute a search under the Fourth Amendment.[147] However, the court relied heavily on the fact that the petitioner had agreed to the search, "gambl[ing] on his ability to convince the officers of his innocence."[148] The *Richardson* court did not discuss whether the petitioner would have had a reasonable expectation of privacy in his hands had he not voluntarily shown them to the officers.[149]

In *United States v. Dionisio*, the Supreme Court considered whether an individual has a reasonable expectation of privacy in his voice.[150] The Court concluded that there is no reasonable expectation of privacy in a person's voice because it is "constantly exposed to the public" and "repeatedly produced for others to hear."[151] The Court relied on *Katz* and determined that a person's voice is something that one knowingly exposes to the public; therefore, it is not subject to Fourth Amendment protection.[152] Similarly, in *U.S. v. Doe*, the Second Circuit held that handwriting samples could be compelled by subpoena in a grand jury proceeding because there is "no intrusion into an individual's privacy . . . [since] nothing is exposed to the grand jury that has not previously been exposed to the public at large."[153]

State courts have examined similar questions. In *State v. Shearer*, the Idaho Court of Appeals rejected a petitioner's claim that his right to privacy was violated when he was pulled over by a

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[147] *Id.* at 845. In *Richardson*, FBI agents dusted stolen bank bags with fluorescein powder, which becomes florescent under ultraviolet light. After the petitioner and his accomplice retrieved the bags, FBI agents and police dropped in on the petitioner at work and asked him if they could view his hands under a light without explaining to the petitioner the purpose of this request.

[148] *Id.*

[149] *Id.*

[150] United States v. Dionisio*,* 410 U.S. 1, 14 (1978) (involving a challenge on Fourth and Fifth Amendment grounds by two grand jury witnesses who were held in contempt of court for refusing to provide voice samples).

[151] *Id.*

[152] *Id.* at 14 (citing Katz v. United States, 389 U.S. 347, 351 (1967)).

[153] United States v. Doe, 457 F.2d 895, 899 (2d Cir. 1972) (challenging on Fourth Amendment grounds a judgment of contempt by the Southern District of New York related to the appellant's refusal to provide the grand jury with a handwriting sample).

police officer and asked to remove his sunglasses.[154] The court held that there is no reasonable expectation of privacy in a person's eyes and stated that "taking minimal steps to temporarily conceal a facial characteristic that is ordinarily and frequently exposed to the public is, in our view, insufficient to create a legitimate expectation of privacy."[155]

Taken together, these rulings indicate that courts will not uphold a right to privacy in a feature that is normally in plain view and that the petitioner generally makes no effort to conceal.[156] For the most part, these decisions rely on the Supreme Court's assertion in *Dionisio,* which provides that "[n]o person can have a reasonable expectation that others will not know the sound of his voice, any more than he can expect that his face will be a mystery to the world."[157] Although these words would seem fatal to a case asserting a right to privacy in one's face, the *Dionisio* Court qualified its statement by asserting that "[e]xcept for the case of the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write."[158] Indeed, the Court concluded its opinion by noting that "nothing [was] being exposed to the grand jury that [was] not previously . . . exposed to the public at large."[159] Therefore, it is not clear whether the "rare recluse" possesses a right to privacy in her handwriting or voice samples.[160] Unlike members of the general public, a recluse presumably has not exposed the characteristic in question to "the public at large."[161] Like a recluse, a veiled Muslim woman keeps

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[154] State v. Shearer, 30 P.3d 995 (Idaho Ct. App. 2001).

[155] *Id.* at 1000. The *Freeman* case is easily distinguishable from *Shearer* because Freeman constantly wore her veil. Therefore, her head and face were not "ordinarily and frequently exposed to the public," unlike the petitioner's eyes in *Shearer*.

[156] *See* United States v. Dionisio, 410 U.S. 1, 14 (1972) (citing United States v. Doe, 457 F.2d 895, 898-99 (2d Cir. 1972)); State v. Shearer, 30 P.3d 995, 1000 (Idaho Ct. App. 2001).

[157] *Dionisio*, 410 U.S. at 14.

[158] *Id.* (citing United States v. Doe, 457 F.2d 895, 898-99 (2d Cir. 1972)).

[159] *Dionisio*, 410 U.S. at 14.

[160] *Id.*

[161] *Id.*

her face regularly concealed from the public.[162] Because no court has ever ruled on whether there is a privacy interest in the case of a person who regularly keeps private a physical feature freely exposed by the general population, such a case would be one of first impression in the United States.

2. The Katz *Test: Expectation of Privacy That Society Is Prepared to Recognize as Reasonable*

The Supreme Court has not set forth a bright line test for establishing how to evaluate the second prong of *Katz,* that is, whether society is prepared to recognize a privacy right as reasonable.[163] However, the Supreme Court has decided several cases upholding certain privacy expectations as ones that society is prepared to recognize as reasonable.[164] For example, in *Minnesota v. Olson*, the Court held inadmissible as evidence a confession made by an individual who was arrested in a home where he was staying as an overnight guest after the police had entered without a warrant and with their guns drawn.[165] The *Olson* Court rejected the government's argument that the defendant was not entitled to Fourth Amendment protection because the place he was staying was not his home.[166] The Court relied on *Katz* to demonstrate that Fourth Amendment protection extends beyond one's home and focused on the fact that the defendant was an overnight guest in the searched home.[167] The Court explained that society recognizes as reasonable an expectation of privacy by overnight visitors in a

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[162] *Freeman,* 2003 WL 21338619, at *1 ("Plaintiff wears the niqab in front of all strangers and unrelated Muslim men.").

[163] *See* Hudson v. Palmer, 468 U.S. 517, 525-26 (1984); Smith v. Maryland, 442 U.S. 735, 740 (1979). *See also Katz v. United States,* 389 U.S. 347, 351 (1967) (Harlan J., concurring).

[164] *See* Minnesota v. Olson, 495 U.S. 91 (1990) (holding that an arrest warrant was required to arrest an overnight guest in the home of a third person); *see also* Bond v. United States, 529 U.S. 334 (2000) (involving the manipulation of a bus passenger's bag by a law enforcement agent).

[165] *Olson,* 495 U.S. at 94.

[166] *Id.* at 96-99.

[167] *Id.*

host's home:

> To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in a host's home.[168]

Similarly, in *Bond v. United States,* the Supreme Court considered whether a search resulted when a government agent checking a bus for illegal immigrants squeezed a passenger's bag located in the bus's overhead storage bin.[169] Finding that society recognizes as reasonable a passenger's expectation that his bags will not be physically manipulated, the Court explained:

> When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers, or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here. We therefore hold that the agent's physical manipulation of the petitioner's bag violated the Fourth Amendment.[170]

The Supreme Court has also provided guidance with regard to when an expectation of privacy is one that society is not prepared to recognize as reasonable.[171] For example, in *Hudson v. Palmer*,

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[168] *Id.* at 98.

[169] *Bond*, 529 U.S. at 336 (2000).

[170] *Id.* at 338-39.

[171] *See* Hudson v. Palmer, 468 U.S. 517 (1984) (holding that society is not prepared to recognize the privacy rights of prisoners in their cells).

the Court considered the case of an inmate who challenged a random search of his prison cell where his contraband property was intentionally destroyed.[172] The Court held that although prisoners have a reasonable expectation of privacy in their cells, it is not one that society is prepared to recognize as legitimate because "[t]he recognition of privacy rights for prisoners in their individual cells cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions."[173] The Court noted that incarceration is the result of committing a crime and that its premise is to withhold an individual's personal freedoms.[174] The Court therefore concluded that a prisoner's expectation of privacy in his prison cell is not an expectation that society is prepared to accept as reasonable.[175]

This body of Supreme Court case law can be used to determine on a case-by-case basis whether an expectation of privacy is one that society is prepared to accept as reasonable, and therefore, whether a search has occurred.[176]

B. Unveiling as an Unreasonable Search

The Fourth Amendment to the U.S. Constitution protects only against *unreasonable* searches.[177] Once a court determines that a search has occurred, the court must determine whether the search was reasonable.[178] As the Supreme Court held in 2000, in *City of*

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[172] *Id.*

[173] *Id.* at 526.

[174] *Id.*

[175] *Id.* at 525-26.

[176] *See* Bond v. United States, 529 U.S. 334, 338-39 (2000) (engaging in a fact-based analysis to determine whether the expectation that law enforcement would not manipulate a passenger's bag to discover its contents was one that society is prepared to accept as reasonable); Minnesota v. Olson, 495 U.S. 91, 95-99 (1991) (engaging in a fact-based analysis to determine whether society is prepared to accept as reasonable overnight guests' expectation of protection against warrantless searches); *Hudson,* 468 U.S. at 526 (engaging in a fact-based analysis to determine whether society was prepared to recognize as reasonable the right of prisoners to protection against unreasonable searches).

[177] U.S. CONST. amend. IV.

[178] City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

Indianapolis v. Edmond, a search is reasonable if there are "special needs beyond the normal need for law enforcement" or if the search is an administrative search with a narrowly limited purpose.[179] In the absence of special needs, individualized suspicion is required for a search to be considered reasonable.[180] In *Edmond*, the Court examined Indianapolis' highway checkpoint system, whereby cars were stopped and inspected by police from the outside and sniffed by a drug dog for signs of illegal drug activity.[181] The Court held that police activity of this sort constitutes a seizure and because such a seizure protects only the city's general interest in crime control, it is unreasonable absent individualized suspicion.[182]

1. Special Needs

In special needs cases individualized suspicion is not required for a search to be considered reasonable because, by definition, the cases are such that "the privacy interests implicated by the search are minimal, and . . . an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion."[183] In stating that the case before it was not a special needs case, the *Edmond* Court referenced three cases in which it had identified special needs.[184] Each of the cases cited by the Court in *Edmond* involved drug testing that was performed

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[179] *Id.* The Court also mentions that in certain circumstances "brief suspicionless seizures of motorists at fixed Border Patrol checkpoint[s] designed to intercept illegal aliens" or sobriety checkpoints may also be considered reasonable. *Id.* (citing United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Michigan v. Dept. of State Police v. Sitz, 496 U.S. 444 (1990)). However, such seizures are not relevant to the discussion of the case of a veiled Muslim woman.

[180] *Edmond,* 531 U.S. at 37.

[181] *Id.* at 48.

[182] *Id.*

[183] *Skinner,* 489 U.S. at 624.

[184] *Edmond*, 531 U.S. at 37 (citing Vernonia School Dist. 473 v. Acton, 515 U.S. 646 (1995)); Nat'l Treasury Employees v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

without individualized suspicion or a warrant.[185] In *Vernonia School Dist. 473 v. Acton*, the Supreme Court upheld the random drug testing of student athletes.[186] In *National Treasury Employees Union v. Von Raab*, the Court upheld the drug testing of employees who work for U.S. Customs Service and who apply for promotions to positions that are directly involved with drugs or in which employees are required as part of their jobs to carry a firearm.[187] The *Von Raab* Court declined to determine whether employees who handle classified material should be subject to random drug testing as well and remanded the case to the Fifth Circuit for that determination.[188] In *Skinner v. Railway Labor Executives' Assoc.*, the Court upheld a Federal Railroad Administration regulation requiring blood and urine tests of employees involved in "major train accidents" to test for drugs and alcohol.[189]

The Supreme Court found in all three cases that drug testing implicated the Fourth Amendment.[190] The Court then balanced the character of the intrusion against the governmental interest furthered by the intrusion.[191] In each case, the Court held that the intrusiveness of a urinalysis is minimal.[192] In determining that the

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[185] *Id.*

[186] *Vernonia,* 515 U.S. at 664-65. The *Vernonia* holding was expanded in Board of Educ. of Indep. Schools Dist. No. 92 of Pottawtomie v. Earls, 536 U.S. 822 (2002), in which the Court upheld random drug testing of all students involved in extracurricular activities. *Id.*

[187] *Von Raab,* 489 U.S. at 677.

[188] *Id.* at 678.

[189] *Skinner*, 489 U.S. at 607.

[190] *Vernonia,* 515 U.S. at 652; *Von Raab,* 489 U.S. at 665; *Skinner,* 489 U.S. at 618.

[191] *Id.*

[192] *Vernonia,* 515 U.S. at 658-59; *Skinner,* 489 U.S. at 624; *Von Raab,* 489 U.S. at 672. In *Vernonia*, the Court cited to *Skinner* and held that the privacy interests related to the manner in which the urine was obtained for a urinalysis were negligible because female students urinated within a stall and male students urinated in a urinal, but were only viewed from behind. *Vernonia,* 515 U.S. at 658-59 (citing *Skinner,* 489 U.S. at 626). Further, the Court held that the privacy interest in the information that the urinalysis disclosed was minimal as well because the test only looked for drugs and not any health condition. *Id.* (citing *Skinner,* 489 U.S at 617). Further, the Court held that the required disclosure of any medications that the students were taking to avoid a false

nature of the intrusion of a drug tests is minimal, the Court in *Vernonia* and *Von Raab* specifically relied on the fact that positive results of such tests are not reported to law enforcement authorities.[193] In *Skinner*, which involved blood in addition to urine testing, the Court cited to its decision in *Schmerber v. California*, which held that blood tests are not significant privacy intrusions because such "tests are commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal and that for most people the procedure involves virtually no risk, trauma or pain."[194]

Having found that the privacy interests involved were minimal, the Court in all three cases found that there were special needs that outweighed the minimal privacy concern.[195] In *Vernonia*, the Court held that deterring drug use in school children constituted a special need.[196] Additionally, in *Von Raab*, the Supreme Court held that because those working in drug departments or those required to carry a firearm for the U.S. Customs Service "depend uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears

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positive result also was minimal. *Id.* at 658-59.

[193] *Vernonia,* 515 U.S. at 658-59; *Von Raab,* 489 U.S. at 663. The *Skinner* Court specifically stated that the testing was not for prosecutorial purposes, but rather, as a way to prevent train accidents. *Skinner*, 489 U.S. at 620.

[194] *Skinner*, 489 U.S. at 607 (quoting Schmerber v. California, 384 U.S. 757, 770-71 (1966)).

[195] *Vernonia,* 515 U.S. at 661; *Von Raab,* 489 U.S. at 672; *Skinner,* 489 U.S. at 607.

[196] *Vernonia,* 515 U.S. at 661. The Court held:

> Drugs had not been a major problem in Vernonia schools. In the mid-to-late 1980's, however, teachers and administrators observed a sharp increase in drug use. Students began to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it. Along with more drugs came more disciplinary problems. Between 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's, and several students were suspended. . . . Not only were student athletes included among the drug users, but, as the District Court found, athletes were the leaders of the drug culture.

Id. at 648-49.

directly on their fitness."[197] Lastly, the *Skinner* Court held that special needs existed, given the significant use of drugs and alcohol by railway employees.[198]

2. Limited Purpose Administrative Searches

The *Edmond* Court also cited three cases in which the Supreme Court had examined administrative searches conducted without a warrant.[199] In only one of those cases did the Court hold that an absolute exemption from the warrant requirement was appropriate, based on the limited nature of the administrative search in question.[200] In *New York v. Burger,* the Supreme Court upheld a New York statute permitting authorities to systematically search

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[197] *Von Raab,* 489 U.S. at 672. The Court held:

> The Government's compelling interest in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious physical and ethical demands of those positions.

Id. at 679.

[198] *Skinner,* 489 U.S. at 607, n.1 (citing 48 Fed. Reg. 30,726 (1983)).

> The FRA noted that a 1979 study examining the scope of alcohol abuse on seven major railroads found that "[a]n estimated one out of eight railroad workers drank at least once while on duty during the study year." In addition, "5% of workers reported to work 'very drunk' or got 'very drunk' on duty at least once in the study year," and "13% of workers reported to work at least 'a little drunk' one or more times during that period." The study also found that 23% of the operating personnel were "problem drinkers," but that only 4% of these employees "were receiving help through an employee assistance program, and even fewer were handled through disciplinary procedures."

Id. (internal citations omitted).

[199] City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (citing New York v. Burger, 482 U.S. 691, 700 (1987)); Michigan v. Tyler, 436 U.S. 499, 511 (1978); Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967)).

[200] New York v. Burger, 482 U.S. 691, 700 (1987).

junkyards without a warrant in order to look for stolen property.[201] The Court in *Burger* found that the owners of commercial property employed in closely regulated industries have a lesser expectation of privacy with regard to that property.[202] The Court held that even in closely regulated industries three criteria must be met in order for warrantless searches to be permitted: 1) "there must be a 'substantial' governmental interest that informs the regulatory scheme pursuant to which the inspection is made";[203] 2) "the warrantless inspection must be 'necessary to further the regulatory scheme";[204] and 3) "[t]he statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant."[205] The *Burger* Court found that the New York junkyard statute fulfilled its three-prong test.[206] First, the Court cited to a statement by the governor of New York approving the statute, in which the governor emphasized the magnitude of the problem of car theft in the state and explained that New York had a "substantial interest in regulating the vehicle dismantling and automobile junk industry."[207] Second, the Court held that the "regulation of the

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[201] *Id.*

[202] *Id.*

[203] *Id.* at 702 (citing Donovan v. Dewey, 452 U.S. 594, 602 (1981); United States v. Biswell, 406 U.S. 311, 315 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72, 75 (1970)).

[204] *Burger,* 482 U.S. at 703 (citing *Dewey,* 452 U.S. at 600).

[205] *Id.* at 703.

[206] *Id.* at 708.

[207] *Id.* The Governor stated:

> Motor vehicle theft in New York State has been rapidly increasing. It has become a multimillion dollar industry which has resulted in an intolerable economic burden on the citizens of New York. In 1976, over 130,000 automobiles were reported stolen in New York, resulting in losses in excess of $225 million. Because of the high rate of motor vehicle theft, the premiums for comprehensive motor vehicle insurance in New York are significantly above the national average. In addition stolen automobiles are often used in the commission of other crimes and there is a high incidence of accidents resulting in property damage and bodily injury involving stolen automobiles.

Id. (citing Governor's Message approving L.1979, chs. 691 and 692, 1979 N.Y.

vehicle-dismantling industry reasonably serves the State's substantial interest in eradicating automobile theft" because "it is well established that the theft problem can be addressed effectively by controlling the receiver of, or market in stolen property."[208] Lastly, the Court held that the statute itself provides for a "constitutionally adequate substitute for a warrant" because it informs the operator of a junkyard that searches will be made on a regular basis and that these searches are "not discretionary acts by a governmental official."[209] Additionally, the court held that the "time, place, and scope" of the search are limited because such inspections can only be made during normal business hours.[210]

In the two remaining limited purpose administrative search cases cited by the *Edmond* Court, the Court also examined warrantless searches of property.[211] In *Michigan v. Tyler*, the Court held that no warrant is required for firefighters to enter a building to fight a fire and that "once in the building, officials may remain there for a reasonable time thereafter to investigate the cause of the blaze."[212] The Court noted, however, that additional entries to investigate a fire require a warrant.[213] Further, in *Camara v. Municipal Court of the City and County of San Francisco*, the Court held that warrantless inspections of properties by housing and public health officials pursuant to San Francisco's Housing Code are unconstitutional.[214] The above cases instruct that a search will be deemed unreasonable in the absence of individualized suspicion unless special needs exist or the search falls into the very narrow category of a limited purpose administrative search.

Laws 1826, 1826-1827 (McKinney)).

[208] *Burger,* 482 U.S. at 709 (citing 2 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 8.10(a) (1986); 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 789 (Kadish ed. 1983)).

[209] *Id.* at 711.

[210] *Id.* (citing United States v. Biswell, 406 U.S. 311, 315 (1972)).

[211] City of Indianapolis v. Edmond, 531 U.S. 32, 37 (citing Michigan v. Tyler, 436 U.S. 499, 507-09, 511-12 (1978); Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 534-39 (1967)).

[212] *Tyler*, 436 U.S. at 511.

[213] *Id.*

[214] *Camara,* 387 U.S. at 540.

IV. FREE EXERCISE AND PROTECTION AGAINST UNREASONABLE SEARCHES AS A CONJOINED CLAIM

Although Freeman's lawyer did not so argue, Freeman's claim is one that falls into the "hybrid" category of free exercise claims because Freeman may assert a conjoining constitutional claim that merits federal attention.[215] In addition to her free exercise claim, Freeman could have argued that the Florida driver's license statute was a violation of both her right to free exercise and her right to Fourth Amendment protection against unreasonable searches. This section analyzes a claim such as Freeman's as both a standalone Fourth Amendment claim, which Freeman might have asserted independent of any other relief, and as a hybrid claim.

In her case before the Florida Circuit Court, Freeman indeed asserted a violation of her Fourth Amendment rights; however, the trial court granted summary judgment in favor of the State on that claim, holding that Freeman did not have an objective expectation of privacy in her face.[216] As previously noted, there is a split in the circuit courts with regard to the permissibility of hybrid claims.[217] Even assuming the existence of these claims, the Supreme Court has yet to address how strong a conjoined claim must be to proceed as a hybrid claim.[218] Courts requiring that a conjoining claim be capable of succeeding on its own render the assertion of free exercise claims unnecessary, as once a court determines that the plaintiff has prevailed on her conjoining claim it need not continue on to analyze the plaintiff's alternative constitutional claims.[219] However, in courts that require that the conjoining claim be

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[215] *See Smith*, 494 U.S. at 881 (distinguishing hybrid cases from those to which the *Sherbert* test does not apply). *See also* Crane, *supra* note 55; *see also supra* text accompanying note 85.

[216] Brief for Appellant at 44, Freeman v. State, No. 2002-CA-2828, 2003 WL 21338619 (Fla. Cir. Ct. June 6, 2003).

[217] *See supra* note 105 (noting the current status of the law among the circuits).

[218] *See supra* Part I.B (outlining the present status of hybrid cases).

[219] Church of the Lukumi Babalu Aye v. City of Hileah, 508 U.S. 520, 567 (1993) (Souter J., concurring) (noting that requiring the conjoining claim of a hybrid claim to be strong on its own alleviates the need for a hybrid claim).

colorable, establishing a standalone Fourth Amendment claim is the key to the assertion of a viable hybrid claim.[220] In those courts, once the plaintiff demonstrates that she has a colorable Fourth Amendment claim, the court will analyze the statute under strict scrutiny, requiring that the state's compelling interest outweigh the burden to the plaintiff and that the statute be the least restrictive means of accomplishing the state's objective.[221]

A. Fourth Amendment Claim

For a Fourth Amendment claim to succeed, the individual asserting such a claim must first demonstrate that a search occurred and then that the search was unreasonable.[222] There is no reported federal or state case analyzing the Fourth Amendment right of a Muslim woman who wears a face veil.[223] However, cases that have analyzed the extent of an individual's Fourth Amendment protection against unreasonable searches may shed some light on

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[220] *See supra* Part I.B.

[221] *See Smith*, 494 U.S. at 899 (O'Connor J., concurring in part and dissenting in part) (indicating that the least restrictive means test is appropriate for determining whether a government regulation of criminal law interferes with an individual's right to free exercise of religion). Although, the majority's holding in *Smith* indicates that the least restrictive means test does not apply to neutral laws of general applicability, it remains the test for hybrid claims, as the Court specifically excluded those claims from its holding. *Id*. at 882.

[222] *See* supra Part III.

[223] A Westlaw search for "all state and federal cases" using the search terms "Muslim" and "veil" and "privacy" produced four cases. Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003) (involving suit under FOIA for information on the detention of people following the September 11th attacks); Freeman v. State, No. 2002-CA-2828, 2003 WL 21338619 (Fla. Cir. Ct. June 6, 2003); Adsani v. Miller, No. 94 Civ. 9131, 1996 WL 194326 (S.D.N.Y. April 22, 1996) (involving copyright infringement dispute); State v. Sport and Health Clubs Inc., 370 N.W.2d 844 (Minn. 1985) (involving discrimination claims in hiring, employment, and promotion based on religion). Three cases were entirely unrelated to this issue. One was *Freeman v. State.* A Westlaw search of all state and federal cases with the terms "Muslim," "veil," and "Fourth Amendment" produced no cases. A search of LexisNexis of its federal and state cases using the same search terms produced the same results.

these rights.[224]

1. A Veiled Woman's Subjective Expectation of Privacy

According to the test articulated by Justice Harlan in his concurrence in *Katz,* in order for a veiled Muslim woman to successfully assert that requiring her to unveil constitutes a search under the Fourth Amendment, she must first demonstrate that she has a subjective expectation of privacy in her face.[225] Based on the analysis of the aforementioned Fourth Amendment cases, which rely heavily on exposure to the general public of the feature claimed to be private, it is possible that a court may conclude that a veiled Muslim woman whose face has not been exposed to the public has an actual expectation of privacy in her face.[226] A woman who chooses to veil her face protects it from exposure to the general public.[227] Accordingly, a veiled woman has a heightened expectation of privacy in her face because she seeks to preserve it as private.[228] Unlike cases in which individuals have resisted orders to produce voice and handwriting samples *after* an offense has occurred, a veiled woman chooses to preserve the feature claimed as private *before* its production was requested.[229] Further,

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[224] *See* United States v. Dionosio, 410 U.S. 1 (1978); *see also* United States v. Doe, 457 F.2d 895 (2d Cir. 1972); United States v. Richardson, 388 F.2d 842 (6th Cir. 1968); State v. Shearer, 30 P.3d 995 (Idaho Ct. App. 2001).

[225] Katz v. United States, 389 U.S. 347, 351 (1967) (Harlan, J., concurring).

[226] *See supra* Part III (detailing the requirements of the *Katz* test and distinguishing Freeman's case from previous cases in which an expectation of privacy was alleged in a body part).

[227] *Freeman*, 2003 WL 21338619, at *1. "Plaintiff wears the niqab in front of all strangers and unrelated Muslim men." *Id.* (indicating that the plaintiff's face is not "ordinarily and frequently exposed to the public").

[228] *See Katz*, 389 U.S. at 351 (holding that "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected").

[229] *Compare* United States v. Dionisio, 410 U.S. 1 (1978) (involving the refusal of witnesses to furnish voice samples to a grand jury in an investigation relating to possible federal statutes prohibiting gambling), *with Freeman,* 2003 WL 21338610 (reviewing the requirement that veiled Muslim women unveil for their drivers license photographs).

in contrast to cases in which the petitioners spoke, wrote, and walked about freely without attempting to hide their handwriting, voices, or appearance, a veiled Muslim woman regularly covers her face and does not expect it to be seen.[230] Likewise, unlike an individual's eyes that have been temporarily hidden by sunglasses, a veiled Muslim woman's face has not previously been exposed to the public.[231] A Muslim woman who chooses to veil has determined that she is commanded by Allah not to reveal her face as part of the requirement that she dress modestly.[232] Because she believes that she is choosing to follow the will of God, she dresses in this manner at all times when she is in public.[233] Thus, a veiled Muslim woman would not reasonably expect the public to see her

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[230] *See* United States v. Dionosio, 410 U.S. 1; *Freeman,* 2003 WL 21338610.

[231] *See Shearer*, 30 P.3d at 1000 (Idaho Ct. App. 2001) (finding no reasonable expectation of privacy in one's eyes by a sunglass wearer and holding that "taking minimal steps to temporarily conceal a facial characteristic that is ordinarily and frequently exposed to the public is, in our view, insufficient to create a legitimate expectation of privacy"). *But see Freeman,* 2003 WL 21338619, at *1 (indicating that the plaintiff's face is not "ordinarily and frequently exposed to the public"). Note that in Freeman's case, Freeman converted to Islam in 1997 and began veiling at that time. Brief for Appellant at 3, Freeman v. State, No. 2002-CA-2828, 2003 WL 21338619 (Fla. Cir. Ct. June 6, 2003). Therefore, the fact that she at one time did freely expose her face to the public could be used in argument against Ms. Freeman's subjective expectation of privacy in her face.

[232] *See* Statement by Sultaana Lakiana Myke Freeman, May 27, 2003, *available at* http://www.aclufl.org/issues/religious_liberty/freemanpersonal_statement.cfm (last visited Apr. 5, 2005). Ms. Freeman stated:

> I discovered veiling to be the ultimate in self-respect and feminism, as this liberating act sent a clear message that I am not an object of sexual fulfillment but a person of strong religious conviction. Whether you believe that the niqab is a requirement of Muslim women or not, the fact is ? [sic] it is how I have chosen to practice my religion. I wear the niqab because I believe that according to The Qur'an and Sunnah, Allah has legislated for the believing woman to dress in this modest way. Embracing the niqab was a very personal choice, and I thank Allah for the protection it has afforded me in life, as a woman of faith.

Id.

[233] *Id. See also Freeman*, 2003 WL 21338619, at *1.

face and could arguably establish a subjective expectation of privacy in her face under *Katz*.[234]

2. A Veiled Muslim Woman's Objective Expectation of Privacy

The second prong of the *Katz* test requires that the claimed privacy right be one that society is prepared to accept as reasonable.[235] The same privacy concerns at issue in *Olson* and *Bond* appear in the case of a veiled Muslim woman.[236] Just as society understands that a person staying with a friend or relative is entitled to privacy and that a bus passenger's bags should not be squeezed for contraband items, so too should society value the choice that religious people make to dress as their religions mandate.[237] Practicing religion in the United States is, like being

[234] *See Katz,* 389 U.S. at 351 (holding that the petitioner has a right to privacy in the conversation he has in a phone booth because he is "entitled to assume that the words he enters into the mouthpiece will not be broadcast to the world").

[235] *Id.* at 361 (Harlan, J., concurring).

[236] Bond v. United States, 529 U.S. 334 (2000); Minnesota v. Olson, 495 U.S. 91 (1990).

[237] *See Olson,* 495 U.S. at 98 (holding that society is prepared to recognize a right to privacy of a houseguest in his host's home). *See Bond,* 529 U.S. at 339 (recognizing bus passenger's right not to have his or her bags manipulated as part of a search for contraband items). *See also* President George W. Bush, Remarks by the President at the Islamic Center of Washington D.C. (Sept. 17, 2001) (discussing the fact that Muslim women who wear head coverings should be treated with respect), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010917-11.html (last visited Apr. 16, 2005).

> America counts millions of Muslim amongst our citizens and Muslims make an incredibly valuable contribution to our country. Muslims are doctors, lawyers, law professors, members of the military, entrepreneurs, shopkeepers, moms and dads. And they need to be treated with respect. In our anger and emotion, our fellow Americans must treat each other with respect. Women who cover their heads in this country must feel comfortable going outside their homes. Moms who wear cover must not be intimidated in America. That's not the America I know. That's not the America I value. I've been told that some fear to leave; some don't want to go shopping for their families; some don't want to go about their daily routines because, by wearing cover, they're afraid they'll be intimidated. That should not and will not

and having an overnight guest, a "longstanding social custom that serves functions recognized as valuable by society."[238] Indeed, the Fourth Amendment is implicated when a state's policy requires that a Muslim woman unveil because society respects the choice of Muslim women to follow her religion and wear a veil. Requiring that a Muslim woman remove her veil for a driver's license photograph would be disrespectful to that choice and an intrusion upon her privacy just as law enforcement's squeezing a passenger's bag intrudes on the privacy of a person's personal possessions.[239]

Further, the case of a veiled Muslim woman is notably distinct from cases in which prisoners' expectations of privacy were held to be unreasonable in light of the unique goals of punitive confinement.[240] The objective of a driver's license, unlike the objective of prisons, is not to restrict a person's privacy, but rather, to ensure safety on the roads and to enable the state to verify that individuals on the road have fulfilled certain state requirements.[241]

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stand in America.

Id.

[238] *Olson,* 495 U.S. at 98.

[239] *Bond,* 529 U.S. at 339. The rationale of the Court in holding that the law enforcement officer's squeezing of a bus passenger's bag violates the Fourth Amendment was that if society expects individuals to value something as private, then this expectation applies to law enforcement officers as well. *Id.* Additionally, removing a veiled Muslim woman's veil without her consent would likely constitute criminal battery in most, if not every, state. *See* FLA. STAT. ANN. § 784.03(1)(a)(1) (West 2003). "The offense of battery occurs when a person: Actually and intentionally touches or strikes another person against the will of the other." *Id.*

[240] Hudson v. Palmer, 468 U.S. 517 (1984).

[241] *See, e.g.,* FLA. STAT. ANN. § 322.263 (West 2004).

> It is declared to be the legislative intent to: (1) Provide maximum safety for all persons who travel or otherwise use the public highways of the state. (2) Deny the privilege of operating motor vehicles on public highways to persons who, by their conduct and record, have demonstrated their indifference for the safety and welfare of others and their disrespect for the laws of the state and the orders of the state courts and administrative agencies. (3) Discourage repetition of criminal action by individuals against the peace and dignity of the state, its political subdivisions, and its municipalities and impose increased

Whereas there is no societal expectation of privacy in a prison cell, society indeed recognizes the privacy rights of members of free society. Thus, individuals lawfully applying for driver's licenses are likely entitled to Fourth Amendment rights.[242] Based on this reasoning, a court could find that a veiled Muslim woman's expectation of privacy in her face is one that society is expected to recognize as reasonable.

3. Unveiling as an Unreasonable Search

If requiring a veiled Muslim woman to unveil is considered a search, then absent individualized suspicion, special needs, or the classification of the search as a limited purpose administrative search, it would be deemed unreasonable, and therefore, a violation of the Fourth Amendment.[243] In the case of a driver's license photograph requirement, individualized suspicion is lacking because such a policy is a broad one that applies to all individuals seeking driver's licenses and is unrelated to particularized suspicion.[244] Consequently, a search of a woman's veil could only be deemed reasonable if it were characterized as a search related to special needs or as a limited purpose administrative search.[245]

Special needs cases are cases in which "the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in

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> and added deprivation of the privilege of operating motor vehicles upon habitual offenders who have been convicted repeatedly of violations of traffic laws.

Id.

[242] *See Hudson,* 468 U.S. at 527 (citing Lanza v. New York, 370 U.S. 139, 143-44) (internal quotations omitted). "A prison shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Id.* This quotation implies that there is a recognized privacy right in the locations the Court lists that are representative of free society.

[243] City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (listing the categories of searches that are considered reasonable).

[244] *See* FLA. STAT. ANN. § 322.142(1) (West 2004) (requiring a full-face photograph for all those seeking a driver's license).

[245] *Edmond,* 531 U.S. at 37.

jeopardy by a requirement of individualized suspicion."[246] Photographing the face of a Muslim woman who chooses to veil would likely not fall into the special needs category. First, in special needs cases, the privacy interests are necessarily minimal.[247] However, the intrusion into a Muslim woman's veil to view her face may not be considered minimal; indeed, the nature of this intrusion is decidedly distinct from the intrusions previously examined by the Supreme Court.[248] For example, required unveiling is unlike urine testing, during which an attendant hears a person urinating or sees the back of a man while he is urinating. As noted by the Supreme Court in *Vernonia,* people often use public bathrooms, where the sounds of their excreting urine can be heard by others.[249] Therefore, requiring that a person supervise students or employees by hearing them urinate is not a substantial invasion of the students' or employees' privacy.[250] However, in the case of a veiled Muslim woman, the woman's face is never unveiled to the public,[251] and therefore, the invasion of her privacy is substantial. The fact that the driver's license photograph requirement applies to the population as a whole does not diminish the fact that the driver's license requirement violates a veiled Muslim woman's Fourth Amendment right. With respect to society generally, the vast majority of individuals have no privacy interest in their faces, and therefore, the driver's license requirement is valid as applied to them.[252] However, because veiled Muslim women have a uniquely significant expectation of privacy in their faces, required unveiling

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[246] Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 624 (1989).

[247] *Id.*

[248] Vernonia School Dist. 473 v. Acton, 515 U.S. 646 (1995); Nat'l Treasury Employees v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989).

[249] *See Vernonia,* 515 U.S. at 658. "[The conditions of urine sample collection] are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren see daily." *Id.*

[250] *Id.* "Under such conditions, the privacy interests comprised by the process of obtaining the urine sample are in our view negligible." *Id.*

[251] *See supra* note 162 and accompanying text.

[252] *See supra* Part III.A.1. (discussing a person's expectation of privacy in a physical attribute).

is a great invasion that is unjustified by the state's asserted interest in safety. Moreover, while urinalysis tests can be designed so that they do not detect any health information about the person being tested other than whether he or she has used illicit drugs,[253] the photograph of a veiled Muslim woman is a revelation of her face—the very characteristic she seeks to protect against exposure.[254] The case of veiled Muslim women is similarly distinct from specials needs cases with regard to the degree to which the searched individual's private information is revealed publicly. In special needs drug testing cases, individuals subjected to testing may be required to reveal to testers certain illnesses for which they are being medicated to avoid a false positive results; in such cases, the exposure of this information can be limited to the testers.[255] Further, this information may be completely anonymous, as the testers who perform urinalysis tests and see the students' or employees' forms may have never seen the subjects of the tests themselves and may have no additional information about the tested individuals.[256] In the case of a veiled Muslim woman, however, because a driver's license will certainly contain both the woman's photograph and name, anonymity cannot serve to protect the woman from an association with the private characteristic she has revealed.[257]

In determining the existence of a special need, the Supreme Court, in *Vernonia, Von Raab,* and *Skinner*, identified an existing problem among the class of people upon which the states whose policies were in question sought to impose a search.[258] Therefore,

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[253] *See Vernonia,* 525 U.S. at 658.

[254] *See Freeman*, 2003 WL 21338619, at *1.

[255] *See id.* (stating that respondent student could have requested that the medical information that he disclosed only be viewed by the laboratory performing the test and not by his coaches or teachers).

[256] *Vernonia,* 515 U.S. at 658-59.

[257] *See Freeman*, 2003 WL 21338619, at *1.

[258] *Vernonia,* 515 U.S. at 661 (noting a problem among high school athletes taking drugs); *Von Raab*, 489 U.S. at 672 (noting the problem that the people it sought to test for drugs had access to drugs and/or weapons); *Skinner*, 489 U.S. at 607 (noting the problem of railroad accidents resulting from employees operating under the influence of drugs and alcohol).

in order to establish that a special need exists in the case of a veiled Muslim woman, a state would have to identify a problem among this class that compels such a search.[259] There was no evidence mentioned in the *Freeman* case that among such a class of women there is a particularly high incidence of driver's license fraud or even that identifying women who have been pulled over has been a problem.[260] Therefore, it is unclear that a special need exists.

Additionally, in order for required unveiling to constitute a special needs case there would have to be a special need beyond the normal need for law enforcement.[261] It is unclear how the state's interest would fit into the category of special needs, as it appears that the state's goals are directly tied to routine law enforcement. As in *Edmond*, where the state's interest in controlling illegal drug activity was viewed as part of the normal need for law enforcement,[262] in this case, protecting against fraud and identifying drivers is similarly part of law enforcement activity. Further, in contrast to *Vernonia* and *Von Raab,* where the results of positive drug tests were not given to law enforcement authorities, in this case, the state license database in *Freeman* was specifically maintained for a law enforcement purpose in order to assist police officers in doing their jobs.[263]

Lastly, the case of a veiled Muslim woman likely does not fall into the very limited category of administrative searches that are permissible absent individualized suspicion. First, the only case the *Edmond* court cited that blanketly allowed administrative searches applied only to commercial property, in which people have a lower expectation of privacy.[264] In *Burger*, the object of the search was a

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[259] Special needs necessitates that "an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Skinner,* 489 U.S. at 624.

[260] *See Freeman*, 2003 WL 21338619.

[261] *Skinner,* 489 U.S. at 624.

[262] *Edmond*, 531 U.S. at 48.

[263] *Freeman*, 2003 WL 21338619, at *4 (finding Florida's compelling state interest in the driver's license requirement is promoting safety and security, combating crime, and protecting interstate commerce).

[264] *Burger*, 482 U.S. at 699 (citing Donovan v. Dewey, 452 U.S. 594, 598-99 (1981)) (holding that "[a]n expectation of privacy in commercial premises,

junkyard that likely had little personal value to its owner and offered a reduced expectation of privacy, given that junkyards are frequently used to conduct illegal activity in the dismantling and selling of parts from stolen vehicles.[265] Moreover, in *Tyler*, the Court held that fire investigators may only enter a building without a warrant when the building is burning and the primary purpose of the entry is to put out the fire.[266]

In both *Tyler* and *Camara*, the Court demonstrated that there is a very high expectation of privacy in one's home and, absent an emergency situation, the Court will not allow a warrantless search.[267] A veiled Muslim woman has a significant expectation of privacy in her face similar to the expectation of privacy that one has in his or her home.[268] Therefore, she cannot be compelled to unveil in a non-emergency situation absent individualized suspicion.[269] The state may not circumvent this requirement by analogizing the woman's expectation of privacy to that enjoyed by the individuals in the administrative search cases reviewed by the Court because, in the case of a veiled Muslim woman, the thing she expects to keep private is a physical feature that by nature is highly personal, rather than commercial property, which is by definition impersonal. For this reason, it appears that the search of a Muslim woman's veil may be characterized neither as a special needs case nor a limited purpose administrative search.

B. Application of the Hybrid Strict Scrutiny Test

Were a veiled Muslim woman to prevail in her claim that the state's driver's license photograph requirement violated her Fourth Amendment rights, she might be able to assert a hybrid claim, which would elevate the level of review of her claim to strict

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however, is different from, and indeed less than, a similar expectation in an individual's home").

[265] *Id.*

[266] Michigan v. Tyler, 436 U.S. 499, 511 (1978).

[267] *See id.* at 511; Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967).

[268] *See infra* Part IV.A.1.

[269] *Id.*

scrutiny.[270] This section analyzes a hybrid claim of this nature through a balancing of the burden that required unveiling imposes upon a Muslim woman who veils and the state interests asserted in *Freeman*.[271]

1. Substantial Burden

As the Supreme Court held in *Sherbert*, the test of substantial burden looks to whether "the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions that law is constitutionally invalid even though the burden may be characterized as only indirect."[272] In describing the burden upon a Sabbatarian imposed by the state's disqualification of those who did not accept employment offers from the receipt of unemployment benefits, the *Sherbert* Court noted:

> The [lower court's ruling upholding the unemployment compensation policy] forces her to choose between

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[270] *See, e.g.*, Swanson v. Guthrie Indep. School Dist., 135 F.3d 694, 700 (10th Cir. 1998) (recognizing the compelling interest test as the appropriate test for a hybrid claim).

[271] Recently there have been a number of bills in the House, including the Real ID Act of 2005 which passed in the House and was referred to Senate Committee on the Judiciary on February 17, 2005, seeking to set federal standards for state driver's licenses. Real I.D. Act of 2005, H.R. 418, 109th Cong. (2005). *See, e.g.,* An Act Making Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, for the Fiscal Year Ending September 30, 2005, and for Other Purposes, H.R. 1268, 109th Cong. (2005) (version including driver's license provisions referred to Senate Subcommittee). Driver's License Security and Modernization Act, H.R. 368, 109th Cong. (referred to House Subcommittee on Immigration, Border Security, and Claims March 2, 2005), *available at* thomas.loc.gov. These bills have yet to pass in the Senate and become law. However, were Congress to pass a national standard for state driver's licenses this analysis would not change because this note discusses whether an exception should be made to driver's license laws requiring fullface photographs for veiled Muslim women. The question of whether driver's laws requiring a full face photographs should be put in place for the general citizenry or whether there should be a federal scheme for state licenses is outside the scope of this Note.

[272] *Id.* at 404 (citing Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

> following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as it would a fine imposed against appellant for her Saturday worship.[273]

The burden imposed by requiring that a veiled Muslim woman unveil for her driver's license photograph is tantamount to the burden imposed in *Sherbert* because, in both cases, the religious individuals must choose between following their religions and receiving a state benefit.[274] As in *Sherbert*, a policy requiring exposure by a woman who believes that showing her face is prohibited by her religion, as the court found that Freeman does,[275] forces the woman to either forgo a driver's license, and therefore lose the privilege of driving, or to decide not to follow her religion and be awarded a driver's license.[276] A Muslim woman who chooses to veil does so because she believes that this is what Allah requires.[277] She thus is in the same position as the petitioner in

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[273] *Sherbert,* 374 U.S. at 404.

[274] *Id.*

[275] *Freeman,* 2003 WL 21338619, at *2.

[276] *Sherbert,* 374 U.S. at 404. The Court noted:

> The ruling [of the lower court in *Sherbert*, denying the appellant unemployment benefits because she refused to accept work that required that she work on Saturday] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. Driving is necessary to Freeman's lifestyle. *See* State: Terrorists May Benefit if Veiled Muslim Woman Gets License, Fox News, *available at* http://www.foxnews.com/story/0,293388410,00.html. "After the hearing Freeman complained that without a license, she can't even drive to the store to buy diapers for her six-month old son." *Id.*

[277] S*ee* Statement by Sultaana Lakiana Myke Freeman (May 27, 2003), *available at* http://www.aclufl.org/issues/religious_liberty/freemanpersonal_statement.cfm.

Sherbert of either following a tenet of her religion or receiving a state benefit.[278] Therefore, under the *Sherbert* test, required unveiling would likely constitute a substantial burden to veiled Muslim women who are required to take full-face photographs in order to obtain driver's licenses.

2. Compelling State Interest

The *Freeman* court upheld the driver's license photograph requirement as applied to veiled Muslim women on the basis that the state has a compelling interest in the statute because it promotes public safety and protects against fraud.[279] On closer examination, however, there are flaws in many of the arguments favoring safety and security upon which the court relied.

a. Speedily Identifying Pulled-Over Drivers

Among the interests asserted by the state and accepted by the *Freeman* court as compelling was the state's interest in speedily identifying pulled-over drivers.[280] It is unquestionable that the state has an interest in identifying pulled-over drivers. However, it is not clear that requiring that Muslim women unveil for their driver's license photographs will, in actuality, help to achieve that goal. As discussed, required unveiling may constitute a search for Fourth Amendment purposes, and therefore, absent individualized suspicion, police officers will be unable to compel a veiled Muslim woman to remove her veil once they have pulled her over so that they may match her face with the photograph on her driver's license.[281] Moreover, because driver's license pictures are often unflattering and many people may change in appearance

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[278] *Sherbert,* 374 U.S. at 404.

[279] *Freeman,* 2003 WL 21338619, at *7.

[280] *Id.*

[281] *See supra* Part III.B. (discussing how required unveiling may constitute an unreasonable search under the Fourth Amendment). *See also* Knowles v. Iowa, 525 U.S. 113 (1998) (holding that the full search of a vehicle after the driver received a citation for speeding absent probable cause violated the Fourth Amendment).

subsequent to taking such a picture, identifying an individual by her driver's license picture is not a certainty. Strict scrutiny also requires that the state's method constitute the least restrictive means of accomplishing its ends.[282] In this instance, a less restrictive means of furthering the state's interest would be to grant these woman an exception to the driver's license photograph requirement while adding an additional requirement that those women carry with them when they drive certain documents, such as a birth certificate or a social security card, verifying their identity as the person granted the driver's license. Because the state has not used the least restrictive means of furthering its goal, the state's interest in speedily identifying drivers does not appear to outweigh the burden the requirement imposes upon a veiled Muslim woman.

b. To Protect against Driver's License Fraud

The Florida court in Freeman also found a compelling state interest in the use of driver's license photographs to protect against driver's license fraud.[283] Although a full-face photograph may assist in the prevention of fraud in the case of an unlicensed driver who borrows the driver's license of a licensed driver,[284] the likelihood of such an instance of fraud is extraordinarily rare. Most people who are driving have valid licenses and have no need to use another's.[285] Moreover, were an individual to drive illegally

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[282] *See* Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981) (holding that "the state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling interest").

[283] *Freeman,* 2003 WL 21338619, at *7.

[284] *Id.* at *4 (outlining the state's argument that the purpose of a driver's license photographs is for speedy identification and to combat fraud).

[285] Because driver's license fraud and driving without a license can only be documented if the perpetrators are caught, it is difficult to find any statistics on the frequency with which driving without a license occurs. However, the statistics below were somewhat indicative of the frequency with which people drive without a valid driver's license. Roughly eighty-seven percent of those driving in fatal crashes have a valid driver's license. *See* AAA Foundation Study on Unlicensed Drivers, Table A.1, License Status of Drivers Involved in Fatal

without a license, it is unlikely that such a person would bother to locate another person's valid license and, if pulled over, attempt to pass it off as her own.[286] Further, if an illegal driver decided to use another individual's license as her own when pulled over, she would likely borrow the license of someone with similar features, given the photograph requirement. It is no more likely that women who choose to veil will "share" their driver's licenses than friends or family members who look alike will "share" theirs.[287]

Moreover, full-face license photographs will only prevent fraud in relation to driving if there is a reasonable suspicion that the driver has committed another violation. The Supreme Court held in *Delaware v. Prouse* that it is a violation of the Fourth Amendment for police officers to randomly pull over drivers on the highway without "an articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is unregistered or that either the vehicle or an occupant is otherwise subject to seizure for a violation of the law."[288] The *Prouse* Court held that the state's interests in public safety were not sufficiently furthered by the

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Crashes in the United States 1993-1999 (June 2000), *available at* http://www.aafoundation.org/pdf/UnlicensedToKill2.pdf. Of the 13.5 percent of driver's without valid license, only 3.6 percent have never been issued a driver's license. *Id.* The rest have driver's licenses that are either suspended, revoked, canceled, or expired. *Id.* Because this study is composed of drivers involved in fatal crashes, it is likely that the percentage of drivers on the road with valid licenses is even higher since it is more likely that those without a valid license will be involved in a fatal accident since such drivers either never fulfilled the license criteria or had their licenses taken away because of a tendency to commit driving infractions. Regardless, the study shows that the vast majority of drivers, 86.5 percent, have a valid license. *See* Delaware v. Prouse, 440 U.S. 648, 660 (1979) (holding that the state's interests in public safety were not sufficiently furthered by the chance that the individual whom law enforcement officers chose to pull over would in fact be in violation of the law).

[286] *See Prouse*, 440 U.S. at 660 (1979) (holding the state's interests in public safety were not sufficiently furthered by the chance that the individual whom law enforcement officers chose to pull over would in fact be in violation of the law).

[287] The AAA Foundation Study on Unlicensed Drivers, *supra* note 285, makes no mention of a danger of people with valid licenses "lending" their licenses to unlicensed drivers.

[288] *Prouse,* 440 U.S. at 663.

chance that the individual whom law enforcement officers randomly chose to pull over would in fact be in violation of the law.[289] The court explained:

> It seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed. The contribution to highway safety made by discretionary stops selected from among drivers generally will therefore be marginal at best. . . . Much of the same can be said about the safety aspects of automobiles as distinguished from drivers . . . .
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> . . . The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure-limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable—at unbridled discretion of law enforcement officials.[290]

Given that drivers can only be pulled over based on an articulable suspicion and not at random, a veiled Muslim woman cannot be pulled over unless she has committed a driving infraction or is driving a vehicle that is unlicensed or subject to seizure.[291] In such a case, the need for a positive full-face identification would be significantly lessened because the person who committed the violation would be in law enforcement officer's presence, and therefore, the need to identify the individual in order to ascertain whether the driver's identity matches that of the individual for whom the police are searching is moot because the offender has been caught.

Further, as the *Prouse* Court observed, the percentage of drivers that are unlicensed is small, making the probability that an unlicensed driver would be discovered based on a random check

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[289] *Id.* at 660.

[290] *Id.*

[291] *Id.* at 663.

minimal.[292] Likewise, because of the small number of Muslim women who choose to wear a full-face veil,[293] it is improbable that this minute percentage of veiled Muslim women will take advantage of the fact that they are not required to take full-face pictures and craft ways to commit criminal acts in which they benefit from the fact that they do not have driver's licenses with full-face photographs. As articulated in *Prouse,* the minimal risk of unlicensed individuals driving on state roads does not justify the institution of a police policy of pulling over drivers at random.[294] For the same reason, the minimal risk that a veiled Muslim woman will allow another veiled Muslim woman to use her driver's license as her own is insufficient to justify invading the privacy rights of all veiled Muslim women who apply for driver's licenses. Therefore, the state's interest in protecting against driver's license fraud is not sufficiently compelling to outweigh the burden that an unveiling requirement places upon a veiled Muslim woman.

c. To Protect against Identity Theft

The *Freeman* court noted an additional compelling state interest in the state's use of driver's license photos in that licenses are commonly used as form of identification.[295] However, as

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[292] *Id.* at 660.

[293] *See Freeman*, 2003 WL 21338619, at *2. "[M]ost Muslims do not veil to the extent the plaintiff does, and that she is in a small minority of Salfeeha Muslim women who refuse to remove their veils when they have their pictures taken for identification." *Id.* There are an estimated 6 to 7 million Muslims in the United States. *See* http://www.cair-net.org/asp/populationstats.asp (last visited Nov. 9, 2004). Presumably, half of the Muslim population, around 3.5 million, are women. Only a small minority of these women wear the full face veil. Even if ten percent wear the full face veil, when in reality it is most probably a much smaller percentage, this would be 350,000 women. This number is roughly .01 percent of the population of the United States.

[294] *Prouse*, 440 U.S. at 660.

[295] *Freeman*, 2003 WL 21338619, at *6 (finding that protecting interstate commerce from widespread identity theft and fraud is a compelling state interest.). But see *Freeman*, 2003 WL 21338619, at *2, regarding the small percentage of women who wear the full-face veil. The fact that such a small number of individuals choose to wear the veil and would require an exception

Freeman noted, Florida's Motor Vehicles Statute describing the legislative intent for driver's licenses makes no mention that one of the purposes of a driver's license is to serve as identification.[296] Although as a general state interest it seems sound that private industry should be able to have a uniform policy regarding what it considers valid forms of identification, the state may maintain this policy while still allowing for an exception for a small minority of its residents.[297] As the Eighth Circuit stated in *Quaring v. Peterson*, "the state may still achieve its interest . . . because people may freely refuse to do business [with the respondent] if she is unable to present adequate identification."[298] Because

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from the full-face photograph requirement negates the *Freeman* court's argument that such an exception would lead to "*widespread* abuse." *Id.* at *6 (emphasis added).

[296] FLA. STAT. ANN. § 322.263 (West 2003) states:

> It is declared to be the legislative intent to: (1) Provide maximum safety for all persons who travel or otherwise use the public highways of the state. (2) Deny the privilege of operating motor vehicles on public highways to persons who, by their conduct and record, have demonstrated their indifference for the safety and welfare of others and their disrespect for the laws of the state and the orders of the state court and administrative agencies.

Id.

[297] In fact, it does not seem as though private industry is entirely reliant on driver's licenses as forms of identification. *See* Identification (ID) Requirements for GRE Tests, *at* http://www.gre.org/idreq.html (listing a driver's license as a valid form of identification but stating that if the license lacked a photograph it is not valid). A search of a number of bank websites using the term "identification" uncovered no statement by any bank indicating what form of identification it will consider valid. *See* Citizens Bank, Important Information About Online Security, *at* http://www.citizensbank.com/misc/online_security.asp (indicating "[w]hen you call us, come to a branch or visit us online, we will ask you for some information to verify your identity"). *See also* http://citibank.com (search for term "identification" came up with no relevant results). *See also* http://fleet.com/home.asp (search for term "identification" came up with no relevant results). *See also* http://www.wau. com/servlet/wamu/index.html (search for term "identification" came up with no relevant results).

[298] *Quaring*, 728 F.2d at 1127 (upholding the right of religious Christians who believe that photographs are forbidden graven images to be exempted from the state's driver's license photo requirement). *See also supra* note 293

individuals do not have a Fourth Amendment right to protection against unreasonable searches by private entities, a business can require any reasonable type of identification it desires in restricting access to its services.[299] Additionally, the fact that driver's licenses are commonly used as valid forms of identification by airlines and other entities does not limit the ability of states to formulate exceptions to their driver's license requirements. The Federal Aviation Administration (FAA) and others may determine for themselves the types of identification that are required for individuals to board planes or make use of other private services; at the same time, a state may choose not to burden its religiously observant citizens by allowing them an exemption from the driver's license photo requirement.[300]

Moreover, if the purpose of the driver's license photograph requirement is to protect individuals who wear a full-face veil from identity fraud, this legitimate state interest would be outweighed by the burden the requirement imposes on the very group it aims to protect. Therefore, a court may find that a state cannot demonstrate that its legitimate interest in speedy identification and the prevention of fraud outweighs the burden the photograph requirement imposes upon veiled Muslim women. It thus is possible that a court may find that a state is required to grant an exception from the driver's license photograph requirement to veiled Muslim women.

(discussing the small number of Muslim women who veil and, therefore, would require an exemption demonstrating the minute effect such an exemption would have on businesses).

[299] Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 411-12 (1995). "The conduct of a private entity is not subject to constitutional scrutiny if the challenged action results from the exercise of private choice and not from state influence or coercion." *Id.*

[300] Note that although the FAA's website contains a great deal of "Passenger Information," including "Airline Contact Information," "Baggage Size Requirements" "Check Airport Status," "Passenger Health and Safety Information," "Travel Tips," "Using Child Safety Seats," and "Wait Times at Airport Security Checkpoints," it does not state what it considers valid forms of identification. *See* http://www.faa.gov/passengers/index.cfm (last visited Apr. 16, 2005).

CONCLUSION

Although there is no federal protection apart from rational basis review for an individual claiming that a neutral law of general applicability interferes with her free exercise of religion, veiled Muslim women may still argue violations of their federal constitutional rights to free exercise of religion and Fourth Amendment protection through a hybrid claim.[301] However, because an argument that exposing a veiled Muslim woman's face is a violation of the Fourth Amendment is revolutionary[302] and because no circuit court has yet applied strict scrutiny based on a hybrid claim,[303] it seems unlikely that a person in Freeman's position will find recourse in a federal court. Even if the courts are unwilling to provide veiled Muslim women with a remedy, however, state legislatures retain the authority and the responsibility to provide accommodations for the religiously observant within their jurisdictions.[304] The seemingly negative reception of Freeman's case by the national media and the American public suggests that legislatures may choose not to carve out an exception for such a marginalized group.[305] However, in

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[301] *See supra* Part I (outlining the present state of free exercise claims).

[302] *See supra* Part II.A (analyzing a Muslim woman's Fourth Amendment right to privacy in her face).

[303] Part I.B (outlining the status of hybrid claims).

[304] *See Smith*, 494 U.S. at 890 (holding it is up to the "political process" to protect the interests of individuals whose religious practice is interfered with by a neutral law of general applicability).

[305] Debbi Gardiner, *Fla. Muslims See Veil Case as Distraction,* BOSTON GLOBE, June 15, 2003, at A12 (citing to Muslims who criticize Ms. Freeman for putting this issue into the spotlight and feel that it reflects poorly on Muslims); Susan Taylor Martin, *A Fight for Religion or Something More,* ST. PETERSBURG TIMES, June 15, 2003, at A2 ("Still you have to wonder. Why would someone who is fighting so hard to protect one basic right-freedom of religion-adopt the dress code of an Islamic sect that has denied right to so many women in Afghanistan and Saudi Arabia."); Gloria Kaplan Sulkin, *Driver's Photos,* CHI. TRIB., June 13, 2003, at 22 (arguing in a letter that "sanity has prevailed in the case of Sultaana Freeman"); *License Is Unveiled; Allowing Woman to Hide Face in Identification Photo Would Have Been Foolish,* THE COLUMBUS DISPATCH, June 10, 2003, at A10; *License Must Do Its Job,* SUN-SENTINEL (Fla.), June 3, 2003, at A18.

denying veiled Muslim women an exception to driver's license photo requirements, legislatures make broader statements about the value of religious freedom and their attitudes toward minority religious groups. In order to promote religious freedom and accommodate the religiously observant, legislatures should examine the actual motivations behind what seem to be general policy requirements and determine whether state goals truly necessitate requiring religious minorities to forgo sacred practices or lose state benefits.